

ANTHOLOGY

OF

UNIVERSITY COLLEGE OF LAW



Centenary Celebration
(1909 - 2009)



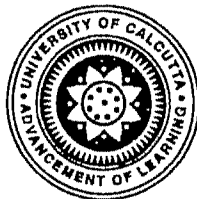
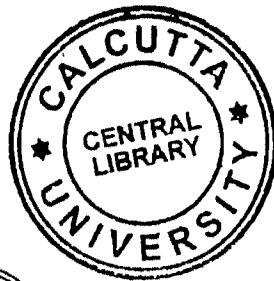
UNIVERSITY OF CALCUTTA
2010

Cuk-H05306-34-0146842

ANTHOLOGY
OF
UNIVERSITY COLLEGE OF LAW

34

Centenary Celebration
(1909—2009)



UNIVERSITY OF CALCUTTA
2010

© University of Calcutta

Published in India by the Registrar, University of Calcutta
87/1 College Street, Senate House, Kolkata 700 073
and Printed by Pradip Kumar Ghosh, Superintendent,
C.U. Press, 48, Hazra Road, Kolkata 700 019.

Price: Rs. 200/-

Reg. No. 2657B

G-146842

CONTENTS

1. Legal Practice	1
— <i>Dr. Rajendra Prasad</i>	
2. Thoughts on World Community	5
— <i>Dr. Sarvepalli Radhakrishnan</i>	
3. Reliance on Gratuitous Promises	9
— <i>Roscoe Pound</i>	
4. "Legal Ideas underlying Religious and Charitable Trusts Amongst The Hindus"	25
— <i>Bijankumar Mukherjea</i>	
5. Heritage of India	33
— <i>Syamaprasad Mookerjee</i>	
6. The Rosenberg Case	39
— <i>D. N. Pritt, Q. C.</i>	
7. Equality Before Law	45
— <i>M.C. Setalvad</i>	
8. Address at the Annual Legal Conference	50
— <i>Dr. K.N. Katju</i>	
9. Industry and Law	52
— <i>Sabyasachi Mukherji</i>	
10. Article 31C—An Outrage on the Constitution	55
— <i>N. A. Palkhivala</i>	
11. Shakespeare and Law	61
— <i>P. B. Mukharji</i>	
12. Constitutional Protection of Civil Rights in India	72
— <i>Durga Das Basu</i>	
13. Leadership of Lawyers and Jurists in Movements for Liberty and Constitutional Government	103
— <i>Rush H. Limbaugh</i>	
14. The Borderland of Police Power and Eminent Domain : A Comparative Consideration	120
— <i>Clarence J. Sundram</i>	
15. Tribal Laws and Procedure in Andaman & Nicobar	132
— <i>Sankar Prasad Mitra</i>	
16. Trial by the Press	137
— <i>Sabyasachi Mukherji</i>	

17. Foundation of the University Law College — <i>Dr. P. N. Banerjee</i>	141
18. Rash Behari Ghosh — <i>Sitaram Banerjee</i>	146
19. The Patriarchal Theory of the Origin of the State — <i>Jagadis Chakravarti</i>	150
20. University Law College Magazine — <i>Dr. Pratap Chandra Chandra</i>	153
21. Role of the Opposition in Parliament — <i>Hiren Mukerjee</i>	162
22. The Law Student and Legislation — <i>J. D. M. Derrett</i>	165
23. Circumstantial Evidence — <i>Dr. S.C. Choudhury</i>	171
24. Constitutional Law of the United Nations and The Trust and Non-self Governing Territories — <i>Purnendu Kumar Banerjee</i>	175
25. Law and Uncertainty — <i>Prafulla Kumar Roy</i>	184
26. Some Revolutionary Changes in the Law of Torts — <i>S. Ramaswamy Iyer</i>	186
27. The Rule of Law — <i>D. N. Sinha</i>	191
28. Role of Law in a Democratic Society — <i>Jayanta Kumar Mitra</i>	195
29. Compulsory Acquisition and Public Purpose — <i>D. Narasa Raju</i>	199
30. A Veneration to Sir Asutosh Mookerjee — <i>Ratna Chatterjee</i>	203
31. Reflections on Civil Right — <i>P. B. Mukharji</i>	205
32. Let Science have a Look at International Law — <i>Bhupen Nath Mukerjee</i>	214
33. Law as an Antidote for the Frailties of Human Nature — <i>Bijitendra Mohan Mitra</i>	221
34. The Role of the Judiciary in the Governmental Process — <i>P. B. Mukharji</i>	224
35. "Law As the Foundation of Civilization" — <i>Dr. Purnendu Kumar Banerjee</i>	235

36. The Principles of Natural Justice	241
— <i>Sunil Kumar Mitra</i>	
37. Justice in Action	250
— <i>S. A. Masud</i>	
38. Some Reflections on Legal Education in Calcutta University	253
— <i>M. L. Upadhyaya</i>	
39. The Lawyer : His Ethics, Learning And Nobility	260
— <i>B. N. Banerjee</i>	
40. Federal-State Relationship under the Indian Constitution	272
— <i>Dr. Debiprosad Pal</i>	
41. Patria Potestas	277
— <i>Balai Chandra Paul</i>	
42. Few Hints for Future Advocates	280
— <i>S.C. Talukdar</i>	
43. An Aspect of University Education	282
— <i>Dr. P.N. Banerjee</i>	

INTRODUCTION

The present publication is a companion volume of the Souvenir brought out at the time of Inaugural meeting of the Centenary Celebration of the University College of Law (now known as the Department of Law of the Calcutta University) held in September 2009.

The Calcutta University Law College perhaps in full measure did not achieve the standard of excellence set forth in the minutes of Sir Asutosh Mookerjee for establishing the College. None the less, the college did attain considerable eminence. Many of the teachers were distinguished lawyers and Judges and a large number of students who passed out of the college achieved success in different fields of life. The College in its earlier days was situated in the Darbhanga Building. Its Library with large and contained many valuable volumes was most compressive. The Law College used to have a magazine to which prominent members of the judiciary, eminent jurists, Member of the Faculty and students, many of whom later distinguished themselves, contributed valuable articles. It was indeed a difficult task for the Editor of this publication to select articles from the old issues of the magazine and to leave out others because of constraint of space.

I conclude with a fervent hope that the Calcutta University Department of Law (as the University Law College is now known) will regain its former glory.

Sri Chittotosh Mookherjee

Former Chief Justice High Court, Calcutta and Bombay

FROM DEAN'S DESK

It is a great privilege for me to write a few lines on the most auspicious occasion of the publication of the centenary volume published by Department of Law, University of Calcutta at its Hazra Campus, which started in February 1983.

Since I have become the Dean on 22.12.2009 it has become by sacred duty to make this prestigious institution unique in its own way with my limited resources and with the active co-operation of all concerned. No doubt, the task is a heavy one and I have to go to a long way ahead to make this Institute worthwhile as per the aspiration of Sir Ashutosh Mookerjee to whom "Law" was the first love.

It would not be out of context if we look for a moment to the background of the Department of Law, as it is today.

When the Calcutta University was founded in 1857, law classes were attached to the Presidency College, which was basically an Arts College. But law courses had started in the Hindu College Calcutta. Elphinstone College, Bombay and at Madras as early as 1855. In course of time, legal education expanded & several institutions at various places began imparting it. The primary objective of legal education at that time was to equip law students, so that they could help the lower Courts and the High Courts in the administration of Justice by enrolling themselves as Vakils or becoming judicial officers & thus serving the interests of the Administration. Before India gained Independence in 1947, the study of law was not taken as a very serious exercise. The conditions of the law schools were none-too-happy. No university desired to run a law school on deficit basis and there was a great variety in duration, courses and standards for the degree in law. Most of the law teaching was conducted by professional lawyers on a part-time basis without much preparation or thought or perspective. There was no tradition of research, such academic legal writing or proper text books on law. There were only a few High Courts in the country and the highest appellate court sat in England and the legal positions were the preserve of the British Barristers. The Government was more in the nature of a police state, rather than a welfare state. According to Professor Arthur Von Mehren, before Independence the Indian legal profession and legal education had not developed "a rationally functional approach to the problems of law & legal order."

Under the leadership of Sir Ashutosh Mookerjee the Senate of the University of Calcutta decided to establish the University Law College, which started functioning from July 1909. Presently, the department is the sole repository in the field of legal study and provides for B.A. LL.B, B.A. LL.B (Hons.), LL.M, Ph.D. and LL.D. degrees. As a Dean I am taking care to facilitate best research facilities specially in Corporate Laws, Criminology and Criminal Justice. As the Dean I have introduced six-months Semester System in B.A LL.B. and B.A. LL.B. (Hons.) course. It has given a new input to LL.M course also. The department, at present, bears the best law library in eastern India. This is a matter of pride to intimate that, this institution has produced quite a large number of eminent legal luminaries, judges such as Bijon

Kumar Mukherjee, Sabyasachi Mukherjee, P.B. Mukherjee, Durgadas Basu, P.N. Banerjee, Sitaram Banerjee etc. and even the first President of India Dr. Rajendra Prasad also obtained his LL.B. degree from this prestigious Institution. I would also like to mention here that our Hon'ble Union Finance Minister Mr. Pranab Kumar Mukherjee obtained his LL.B. degree from this prestigious Institution. I am really proud to become Head and Dean of the same institution.

The Department has been trying to provide for opportunities for researchers and job-seekers. Our new faculty council which works with my aid and advise has been opting for new and better ways to cater to the needs of students. The department has been engaged to arrange on regular basis seminars, workshops, moot courts and lectures by eminent Jurists of India and abroad. From 2009 till date the department has arranged at least ten such seminars and lectures which were graced by eminent jurists like Prof. Tahir Mahmood, Justice Altamas Kabir, Justice A. K. Ganguly, Senior Advocate of the Supreme Court Mr. K.K. Venugopal and many others. Our students have been regularly participating in many national and international moot court competitions.

To facilitate law study in a better way following arrangements amongst other have been taken:—

- (i) students are given need based syllabus;
- (ii) more meritorious students are choosing the vocation;
- (iii) intensive vigilance is provided over the requirements of the students;
- (iv) private organizations are more generous to the requirements of the law college and the Government is more flexible in the matter of releasing funds;

However, there are many hurdles which are on the way of materializing our ideas of making this institute far better and one of the most renowned institutions of the world, if we can overcome such hurdles with the help of the Government as well as members of generous public and other benevolent bodies. Before I conclude I would like to quote a few lines of Mr. A.T. Markose who described the condition of legal education in India at the conference of the Indian Law Institute (1958) as follows:

“Legal education in India as now carried on it most of the Indian law faculties requires reform. There is a feeling that low salaries antiquated curriculum, under-staffed faculty, inadequate library, absence of postgraduate teaching, lack of research facilities and defective examination system are the obvious drawbacks. There is a view that the one-way traffic in ideas involved in the delivery of class lectures without arrangements for any response from the students kills their enthusiasm...comparatively, Indian legal education has been neglected now for a number of years and requires study on a national level”.

Prof. (Dr.) S.S. Chatterjee
Head and Dean
Faculty of Law
University of Calcutta

1958

1

LEGAL PRACTICE

Dr. Rajendra Prasad

President, Republic of India

When I set up my legal practice soon after my niece's marriage I began getting cases early enough for a beginner and I became independent financially and never had to ask for remittances from home. My brother's difficulties had increased after his daughter's marriage and I did not want to add to them. Rich litigants did not come to me, but there was one exception. Rai Bahadur Hariharprasad Sinha, who knew me and had offered help when I wanted to go to England, entrusted me with the entire legal work in respect of his zamindari from the day I started practice. The last brief I held as a lawyer was also in a big litigation in which he was involved.

I worked hard and single-handed in poor litigants' cases. Some of the judges came to know me and were pleased with my handling of the cases. Some lawyers are in the habit of calling on judges but I never did so, the only place where I met them being the court room. Sir Lawrence Jenkins, the then Chief Justice, who retired a year after I started practising, was so pleased with me that when he left Calcutta he presented me with an autographed portrait of himself. Sir Asutosh had offered me the professorship in the Law College. I had thus reason to feel gratified with my success.

Meanwhile came the announcement, on the occasion of the Coronation in 1911, separating Bihar from Bengal, and in April 1912 Bihar became a separate province. For some time it did not have a separate High Court and University. All the cases of Bihar were heard in Calcutta and its students also sat for the Calcutta University examinations. The move for a separate High Court, however, started very soon, and the fears that this proposal would be shelved because of the war with Germany proved groundless.

My old colleague in the Muzaffarpur College, Baidyanath Narayan Sinha, had also started practising in the Calcutta High Court. We became very close friends.

Baidyanath suggested that we should take the M.L. examination. I was fully engrossed in my practice and was determined to make a success of it. I feared that my studies would interfere with my work, but I accepted friend's advice and both of us began preparing for the examination, which was considered to be the most difficult of the examinations conducted by Calcutta University. We had little time for study, and I had the additional work of teaching in the Law College. Sometimes I felt like dropping the whole idea, but Baidyanath would not

let me do it. He kept on goading me, reading out books to me like a teacher. He said : "You have secured the first rank in all examinations from the Entrance to the B.A. In the M.A. you failed to maintain that rank and in the B.L. you have just managed to pass. You can wipe out this blot on your otherwise unsullied record only by your appearing for the M.L. examination and securing a high rank". Thanks to this logic and the pains Baidyanath took for me, I set about studying earnestly.

The examination was to come off in December 1915. Never before had I worked so hard for this examination. Added to my usual routine, this put such a strain on me that I fell seriously ill. I feared that every thing would now go away. Patna was to have its separate High Court in March 1916. Both of us realised that if we failed to take the test while living in Calcutta, we would never be able to do it after shifting to Patna. This was our last chance. Therefore, we stuck to our resolve. I recovered from my illness, as if by sheer determination.

For the examination we managed to get some time off by having our cases adjourned. Most of our cases were from Bihar and they were generally entrusted to judges who were likely to be transferred to Patna. All of them were kind enough to agree to our request.

After the examination, we left for Patna, where we learnt of our results. We were both successful, Baidyanath getting a second class and I a first class. I learnt later that I had scored very high marks. We were the first two Biharis to have passed this examination. According to the University rules, one could get a Doctorate in Law after passing M.L. by submitting a thesis. Both of us thought of submitting thesis and, in this connection, we consulted Sir Gurudass Banerjee in the choice of the subjects.

I recollect a number of interesting anecdotes about Calcutta during the early days of my practice. At the beginning of my career, the manager of a client came to me to file an appeal. He desired to engage a senior counsel, and wanted me to assist the counsel. He mentioned the name of a senior lawyer who commanded a good practice, and used to take up mostly Bihar cases but whom I did not know personally. I felt happy at the prospect of working with a senior lawyer of his reputation.

One evening, having prepared a rough draft of the appeal, we went to the lawyer's residence. Usually he never worked at night and liked to finish his work by the evening. He was just winding up his work for the day and when the manager, who was already known to him, told the lawyer the purpose of his visit, the latter asked him to come the next day. Then he inquired whether the manager had got the draft of the appeal prepared by a junior counsel and the manager replied in the affirmative, mentioning me as the junior counsel. As soon as he heard my name, he shouted : "You seem to have engaged a funny person as junior counsel whose name I have never heard. For aught I know, he knows nothing and will not prove of any assistance. Everything will have to be done by me." The manager told him that the junior counsel was, no doubt, a fresher, but at the same time a brilliant man. The lawyer repeated his uncomplimentary remarks about me. There the manager pointed to me, sitting there quietly by his side, as the junior counsel in question. Greatly embarrassed, the counsel

ultered : "You should have met me as soon as you came. I do not know you. My remarks were not meant to disparage you because I hardly know you. I said so since I felt that a fresher was hardly likely to know much about this work." Then he apologised to me I replied that as he did not know me and as undoubtedly, I was a fresher, his remarks were quite justified. Arranging to meet him the next day, we took leave of him.

When, the following day, he saw the appeal drafted by me, he felt very pleased and began to praise me before the other lawyers. I came into closer touch with him and he was very good to me. His one complaint was that I was careless about my clothes and outward bearing. He disliked this and never ceased advising me to be fastidious in the matter of dress.

I was reluctant then, as I am ill, to go out of my way to meet any one whom I did not know. Although I had been practising for two years or so, I had not met Dr. Rash Behari Ghosh. Though I had once won a case in which he held the brief of the opposite party, I had no opportunity of meeting him. A case from Bihar gave me this opportunity. The counsel on our side were Rash Behari Ghosh and Kulwant Sahay, who subsequently became a judge of the Patna High Court and on the opposite side was Sir S.P. Sinha.

Senior barristers and advocates often attended court only when they had to argue the case. Having too many cases on hand, at the time of the other side's arguments they were generally preoccupied with cases in other courts. Some times they could not attend even for replying to the arguments, in which case, the junior counsel had to attend to them. In the case which I won against Sir Rash Behari, our senior counsel was preoccupied with another case and I had to argue it.

The Gaya case was a complicated one in which the arguments of the opposite side continued for four days. Sir S.P. Sinha argued slowly and with great clarity. Being the juniormost counsel on our side, it was my duty to take notes of the arguments. I was quick in writing, a habit which I acquired early in life and which I further improved in my college days when I used to take down full notes of Professor Percival, a fast speaker, and of the lectures in the Dawn Society. I had, therefore, taken full notes of Sir S.P. Sinha's arguments.

The next day I went to Sir Rash Behari's house with these elaborate notes. While he was scanning them. I felt nervous as to what his reaction would be. A temperamental man, he was often cross with his juniors in whom he could not tolerate any slackness. His juniors were, therefore, always in panic when they faced him. Even judges knew this weakness of his. Sometimes he would throw a book or paper he would be reading in the court at a junior. Therefore, when I was watching him with a fear, he looked upon from the notes and asked me who had prepared them. Thinking that they were not to his satisfaction, I could not get myself to reply to him. But Kulwant Sahay, who was also there, said that the notes were mine. Then Sir Rash Behari asked me : "Since when have you been working? I do not know you at all." Now I was convinced that I had committed some blunder and was speechless. Again Kulwant Sahay replied that I had started work only recently. My relief could be imagined when Sir Rash Behari, far from feeling angry, patted me on my back and said the notes were excellent.

Kulwant Sahay intervened to speak of my good academic record. Rash Behari Ghosh was obviously very pleased and said : "If you put in hard work like this, you will go far."

After this whenever I had to work with Sir Rash Behari, he always relied on my notes and made the fullest use of them. I was the witness of his anger at a lawyer in this very case. Once while going through the notes, he enquired if there was any evidence on record in support of a particular contention. I kept quiet, but the advocate from Gaya, who had worked in the case in the lower court also, replied that there was none. Sir Rash Behari Ghosh said it could not be so since Sir S.P. Sinha had averred that there was such evidence. He then asked the Gaya advocate to go through the papers again and tell him the next day. But the next day the Gaya lawyer gave the same reply. Rash Behari, who had himself studied the papers and made certain marginal notes, lost his temper and threw away his notes, saying. "How can I rely on your notes in future?" After showing him his own marginal notes, Sir Rash Behari made some very harsh remarks. I could not help feeling gratified that no such mistakes had been committed by me.

After the M.L. examination, before I returned to Patna, I had a small but complicated case which I had got to argue before two judges, both of whom were to be later transferred to Patna and which I won. The judges were well impressed. When they came to Patna they praised me highly to others and said that the advocates coming to Patna from Calcutta were very promising and would be able to hold their own against senior local lawyers.

In a second appeal, only legal arguments are permissible. Facts of the case as found by the lower court have to be taken for granted. Only minor cases came in second appeal. In Calcutta, I got mostly second appeals of poor clients. I had to be well up in law to be able to argue on legal points in such appeals. I had made it a rule never to accept a case unless I was fully satisfied that the lower court's decision was wrong in law and I could hope to get it reversed by the High Court. Therefore, I won most of my second appeals.

Further, in second appeals, there is a short preliminary hearing before the court is satisfied that there has been a mistake of law which provides a basis for argument, and after which it admits and issues notices to the other side to be present. The Registrar of the Patna High Court, who was not well up in law and who was authorised to put up cases for hearing by the judges if he thought there was a case for admission, used to reject many of my appeals at the preliminary stage. But under rules his rejection was not final and he had to refer it to the judges for final orders. Many of my appeals went up to the judges in this manner and nearly all of them were admitted by them. The two judges referred to above perhaps did not even go through the papers put up by me. I also saw that cases which I declined to take up because of some inherent weakness in them were lost in the court when put up there by order lawyers.

1955

2

THOUGHTS ON WORLD COMMUNITY

Dr. Sarvepalli Radhakrishnan

Vice-President of India

A foremost thinker of the world to-day lends wise thought over the prospects of peace in the world community while presiding over the General Conference of the UNESCO held at Montiviedo, South America a few months back.

The world once divided by oceans and continents is today united physically but it is divided in mind and spirit. We are compelled to live together and let us act in the hope that we will live together as friends. Whatever our differences may be, we are concerned to know each other. If we stand apart, if we fail to communicate with each other and indulge only in longrange abuse we will not be acting in the spirit of U. N. We have all subscribed to the United Nations Charter which affirms faith in the fundamental human rights.

ESSENTIALS

Political freedom and economic justice are both essential for human well-being. We should lay stress on the improvement of the economic conditions of the people as well as on liberty and freedom. No society can claim to be democratic, if it does not permit political liberty, freedom of conscience, for peaceful and orderly changes of government. No true democracy can remain satisfied merely with the conditions which safeguard the political liberty and freedom of the individual. It must secure economic conditions which will validate its faith in the ultimate worth of the human person of the individual. If these are to be taken seriously, we must do away with all kinds of discriminatory practices. We must assist the independence movements in colonial territories, recognise that poverty in any part of the world constitutes a danger to prosperity in other parts, promote racial harmony, not acquiesce in extermination, segregation or enslavement.

In the United Nations, we must try to comprehend our own insufficiencies and correct them. The international situation has improved somewhat. Though there is no settlement in Korea, fighting has stopped. Anxiety is felt on all sides for unification of Korea on the basis of free elections. The Indo-China war has ceased and it is the general hope that the three States of Laos, Cambodia and Viet-Nam may become independent and answerable to themselves. Any outside interference with these States may spoil the chances of a democratic settlement. The

Anglo-Egyptian agreement about the Suez is a considerable step towards peace in the Middle East.

In regard to the Colonial problems, many are still unsolved though some advance is noticeable in regard to the future of Gold Coast, Nigeria, Tunisia and Greenland.

TRIBUTE TO FRANCE

I may here refer to the question of French Possessions in India. It has been solved in a peaceful, democratic and civilized way. I should like to congratulate the Government and the people of France. France that gave the world the ideals of liberty, equality and fraternity can do no other. The ticklish problem of Trieste has also been settled with the good will of the powers concerned. The other one, of Saar, is, I hope, nearing solution. Even in regard to the problem of disarmament, we see some signs of hope.

While we were glad that many of the outstanding questions are being tackled, it is unfortunate that in many of these matters the United Nations Organisation has been bypassed. In the Geneva Conference about Indo-China, we had discussions with the People's Government of China and their attitude was co-operative and helpful, and yet that Government is still unrepresented in the United Nations, and so the Indo-China Conference had to take place outside the United Nations. In spite of all its defects, the United Nations, is the symbol of human hope for the unity which we have been seeking for centuries. The spark of the spirit in us has compelled its creation.

Science and mechanical ingenuity have been busy for more than four centuries, in knitting together the whole habitable surface of the planet by a system of communications. Every form of human intercourse is rendered possible. The political unification of society is inevitable. The present system of world broken up into 60 or 70 national States, is an anachronism in an age which has discovered the technique of flying and the manufacture of the atom bomb. Will unification be brought about by force which, in this atomic age, will mean not only material but moral devastation, or will it be by the alternative method to war, voluntary co-operation without the use of violence and coercion?

The United Nations asks us to learn to live in a world community and not die of the disease of chauvinistic nationalism. The weakness of the United Nations is the human weakness. We still believe in nationalism, though we aspire to be members of the international community.

Powerful Nations in the world are attempting to use the United Nations and its agencies as instruments of their national policies. If we are to develop an international outlook, it is essential that member nations should, at any rate, in their relations with international organisations, subordinate national considerations to international obligations, which they do not always do.

CONTENT OF DEMOCRACY

I am afraid that in our attempts to defend democracy we are throwing away the content of

democracy. Governments are becoming more centralised, more through their administration, more coercive on their citizens, more effective in their control of thought and opinion, even in democratic States. Oliver Wendell Holmes, the great liberal who was Associate Justice of the Supreme Court of the United States, once wrote that *freedom of speech is freedom for the thought we hate*. To attempt to compel persons to believe and live as we do is not a feature of democracy, and has been a perpetual source of strife in the world. Evangelism in politics, in economics or in religion will have to be restrained, if we are to live together in this world. We should not punish people for holding opinions which are unpopular or distasteful. We can punish them only if they commit offences or violate the laws of the country. We should assume people to be innocent unless they are proved to be guilty, and not hold them to be guilty, until they prove themselves to be innocent. If the drift to totalitarianism in democracies continues, there will be nothing left for democracies to defend.

UNDER DEVELOPED COUNTRIES

We, in the UNESCO, are deeply concerned about the question of the underdeveloped countries. One of the chief results of World War II is the rise of new Asia and Africa. I have recently been in some South American countries and there also the problem is not much different. If advanced countries help with a small fraction of what they are prepared to spend on armaments for the development of under-developed regions, if they help to remove destitution, disease and despair, they will better safeguard the interests of peace. From the start of UNESCO, we have been deeply concerned with the spread of fundamental education in countries which are suffering from mass illiteracy. We are using all mass media for the spread of literacy. But fundamental education is not to be confused with the acquisition of information and skill. Habits of scientific thinking will also have to be imported.

The immense impact of mass media on our lives encourage passively, acquiescence and conformity. Young minds are exposed to surface objectivity, to slogans and catchwords, to the acceptance and elaboration of the obvious. We all eat, think, hear and read substantially the same things. We develop a number of stereotyped attitudes. Individual contemplativeness and creativeness are not encouraged. We are forgetful of the sources of our moral strength. We are afraid of ourselves, of the chaos within us, afraid of the penetrating light of the great teachers. The mass man must become a moral man.

RIGIDITY

I hope that the educators of the world are on their guard against the dangers of rigid conformity and fanaticism. To me the most essential need of our age is the spirit of religion in the large sense, of reverence for truth and righteousness in action. The pursuit of money and pleasure is killing the power of mind and spirit. T. S. Eliot thinks that, when we pass away, wind will blow over the ruins of our homes, saying : "Here were decent Godless people, their only monument the asphalt road and a thousand lost golf balls."

In the UNESCO, we should make fundamental education, to youth and adults, to all of

us, base itself on the twin principles of truth and love. We live today in a state of cold war, i.e., armed fear. It is not peace but a precarious equilibrium in which dissension does not declare itself because of mutual fear, it is not a state of order, there is no inward tranquility.

We have to build up loyalty to the world community in men's hearts and minds. Only then shall we have a human society bound by love of one and the same end. Then the outer order will be the spontaneous expression of inward peace. To build that peace in the minds of men is our task.

Wealth and power depart from nations as from individuals. No nation in this world can hold its place of primacy in perpetuity. What counts is the moral contribution we make to human welfare. Let us therefore try to develop the qualities of charity in judgement and compassion for people with whom we find ourselves in conflict. If we adopt such an approach, the tensions of the world will diminish rapidly. Let us work with humanity as our goal.

RELIANCE ON GRATUITOUS PROMISES

Professor Roscoe Pound

A.M., Ph.D., L.H.B., J.U.D.

(Article specially contributed to the University Law College Magazine)

The author of this thoughtful article, Dr. Roscoe Pound, Emeritus Professor of the Harvard University, U.S.A. delivered lectures in 1953 as Tagore Professor of Law for 1948 on "The Ideal Element in Law". Incidentally it may be mentioned that he made a gift of the copyright of his lectures the proceeds of which are to be utilized for the University Law College on account of a new building or its library. We take this opportunity to convey him our heartfelt gratitude.-[Editor]

What we took to be the law on this subject in the nineteenth century is brought out well in the leading American case of *Throne v. Deas*¹ decided in 1809, in which the opinion of the court was delivered by Chief Justice, later Chancellor, Kent, one of the greatest names in American judicial history. The case was this: A ship was about to sail from New York to a southern port. One of the three owners who sailed with the ship, before sailing asked defendant, also an owner, to have the ship insured. The latter told him not to be uneasy as to that because it should be done. Later another of the owners, a co-plaintiff, learning that the ship had not been insured, told the defendant that if the latter did not immediately procure the insurance the co-plaintiff would do it himself. The defendant replied that "he would that day apply to the insurance offices and have it done." He did nothing, however, and the ship was wrecked uninsured. The two owners to whom the promises had been made brought "an action on the case for nonfeasance." Recovery was denied. Chief Justice Kent said that "by the common law a mandatary, or one who undertakes to an act for another without reward is not answerable for omitting to do that act, and is only responsible when he attempts to do it and does it amiss." In those days the law of New York was still formative and much reliance was put upon the Roman law. Kent, who was a learned civilian, admitted that the Roman-law rule, which held the mandatary to his gratuitous promise, was more equitable and was to be preferred since the promise relying upon the good faith of the mandatary "was thereby prevented from doing the act himself or employing another to do it."² Such was undoubtedly the common-law rule as to a mandate at that time. Lord Holt in organizing the law of bailments at common law in the leading case of *Coggs v., Bernard*,³ treated mandate, which in Roman law was consensual,

as a real contract, requiring delivery of a res to make it effective. This was followed in Sir William Jones' Essay on Bailment and Judge story's treatise on Bailment and became settled law.

How die a rule so out of line with accepted propositions of morals and ideas of justice come to be so firmly established? To answer this question we must look into the basis of legal obligation.

As a general proposition may we not say that the legal order seeks to secure the reasonable expectations involved in life in civilized society? But recognition of what these expectations are has been a gradual process in the development of civilization and hence in the development of law. First to be recognized and secured were expectations having to do with peace and order, calling for securing of the simpler forms of the social interest in the general security. Thus we find in the very beginnings of law a postulate that in civilized society men must be able to assume that others will commit no intentional aggressions upon them. But the corollary that now completes the proposition, namely, that one who intentionally does anything which on its face is injurious to another must repair the resulting damage unless he can (1) justify his act under some social or public interest, or (2) assert a privilege because of a countervailing individual interest of his own which there is a social or public interest in securing, was not generally accepted till the present century. A further postulate that in civilized society men must be able to assume that others will act reasonably and prudently so as not, by want of due care under the circumstances, to impose upon them an unreasonable risk of injury got recognition in the classical Roman law but in the common law had its real development in the nineteenth century. A further proposition that one may be held liable for unintended, non-negligent interference with the person or property of another through failure to restrain or prevent the escape or getting out of bounds of some thing or agency which one maintains or employs such thing or agency having a tendency to get out of bounds and do harm, began to be argued in the last third of the nineteenth century, was hotly debated in the first two decades of the present century and has only had general recognition in the present generation.⁴

With economic development the law begins to recognize and give effect to expectations involved in economic relations—in the relations upon which the economic order depends. Thus there comes to be increasing recognition of a postulate that in civilized society men must be able to assume that those with whom they deal in the general intercourse of society will act in good faith and hence (1) will make good reasonable expectations which their promises or other conduct reasonably create, and (2) will carry out their undertakings according to the expectations which the moral sentiment of the community attaches thereto.

, With the general security and the security of economic relations provided for, the humanitarian thought of today, the mode of thought of the welfare or service state, is developing recognition of expectations of a full moral and social individual life. We see this in workmen's compensation, in theories of shifting liability to those who may pass the losses of each of us to all of us or at least to enterprises and activities of which they are normal incidents or even to those better able to bear them. It is behind plans for social security and takes ideal forms

in universal declarations of rights for a universal organization of mankind in which men are to be relieved of want and fear and to be guaranteed just terms of leisure. Today we are thinking mostly of the third stage before complete development of our law to the exigencies of the second stage has become complete.

The oldest and most general idea in the development of contract is not one of enforcing promises. It is one of enforcing security for performance. Thus hostage and pledge are the ideas from which we must begin the history of contract. From the start there is a sharp distinction between the promise or agreement of itself and the transaction which creates legal liability. Gradual modifications, additions and coming in of new ideas, put more and more stress upon the former. But a necessity of the other governs in Roman law to the end, persists long in the civil law, and hangs on in the common law of today.

In the classical era of Roman law the everyday contract is the formal *stipulation*—question and answer in the very words of the question using the formal verb *spondere* suggesting a promise in that form backed by pre-legal religious sanctions.⁵ This was available only to Roman citizens but by the *ius gentium* equivalent words could be used if the form was kept.⁶ Another formal contract was the literal (*expensilatio*) likewise a transaction of the strict law made by entries in the domestic books of account of Roman citizens.⁷ There came to be added a category of what were called real contracts, in which obligation was created by delivery of possession of something by the one party to the other. Here originally there was a transfer of the legal title with an agreement of good faith for re-conveyance when the purpose was achieved.⁸ The oldest was loan for consumption, the only real contract of the strict law.⁹ But about the middle of the second century B.C., as a result of economic progress, the *bonae fidei iudicia* provided for real contracts of deposit for safe keeping, loan for use, and pawn. They provided also for a category of usual contracts: Sale, letting and hiring, mandate, and partnership, which required neither form nor delivery of a *res* but were contracted solely by consent of the parties. These were not fully developed until under the empire.¹⁰ However, recognition of those consensual contracts did not mean that *consensus ad idem* alone and of itself could make a legally enforceable contract. The doctrine that no action arose from a bare agreement remained in force. Later further additions were made: The innominate contract, an exchange of promises where one party performed and thus clothed the pact and made of it a contract,¹¹ actionable pacts, praetorian, in which the praetor gave actions *in factum*,¹² accessory, that is, incidental to a transaction in a recognized category of contracts,¹³ and statutory, introduced by legislation of the later empire for certain special kinds of agreement.¹⁴ Also the formality of the stipulation came to be greatly relaxed and writings reciting that the form had been gone through with took its place. Justinian enacted that the presumption created by such writings could only be overcome by proof that one party or the other had been absent from the city at which the writing was dated during the whole of the day which it recited.¹⁵ This all but made the writing *surffice*. Thus after one thousand years of development from the Twelve Tables to Justinian there was little left in Roman law of the doctrine of unenforceability of bare agreements.

In the later Middle Ages the civil law and the canon law were not in agreement, the one denying legal validity to certain mere pacts not otherwise objectionable¹⁶ while the other held that it was the duty of a Christian to keep his promise without regard to its form.¹⁷ But the influence of the church law and of the writers on the law of nature resulted in practical disappearance of the category of unenforceable promises and agreements, not otherwise objectionable, even where it was maintained in theory, and there has been a complete abandonment of it in recent codification throughout the civil-law world. An idea of *causa*, a reason for legally enforcing pacts, taken from Roman law, was given currency by Domat.¹⁸ But Domat held and Pothier, who said that the idea of cause for enforcing was far from being in accord with nature or reason,¹⁹ agreed that in a gratuitous promise the intention of benefitting the promisee was sufficient cause. The French Civil Code (1804 took up the term *causa* from Pothier and this was followed in Continental Codes based upon it. It has led to much discussion.²⁰ In the Roman-Dutch law of South Africa, under English influence, there was for a time an attempt to treat *causa* as the "consideration" called for by the common law. But that law now, as originally, requires neither form nor consideration.²¹ Scotland received the civil law from the Dutch Universities, so that nothing in the way of consideration is required by Scots law.²² As Planiol says, the requirement and the idea are useless....²³ The most recent codes give them up entirely.²⁴

In the common law we may see a like gradual extension of the sphere of enforceable promises and agreements very much as happened in Roman law.

Contracts at common law, looked at analytically, are formal, real, or simple, according to whether the source of obligation is in the form of the transaction, in the delivery of something from one party to the other, or in the agreement of the parties. The common-law actions upon contract are debt, covenant, account, and assumpsit. Debt is the oldest. A writ of debt is to be found in Glanvill at the end of the twelfth century.²⁵ It has the same form as a writ of right brought to recover land and is in the form of recovery of property detained rather than of a sum of money owed. Indeed, if one owed another a horse by reason of a sale or exchange, debt could be brought for the horse, although if the defendant had borrowed the horse and had not returned it, the action was *detinue*,²⁶ a later development out of debt by a slight change in the words of the writ.²⁷ As trial in an action of debt was by compurgation, except where the debt was established by an instrument under the debtor's seal, the action came to be used only for such cases. Another writ of the same general type was account, known from 1232 but probably older.²⁸ It enforced a duty owing by a bailiff, who had collected the profits, to render a reasonable account to the lord of the manor. Partly by fiction and partly by extension by analogy, it was made to cover cases where one was bound to account to another for something which had been delivered to him or which he took or held as partner or agent.²⁹ The writ of covenant appears at the end of the twelfth or beginning of the thirteenth century.³⁰ It was a still further departure from the idea of demanding recovery of one's property in a writ of the same form as debt. But in the fourteenth century it became settled that a covenant must be under seal.³¹ Instead of the word "render" it commanded the defendant that "justly and without

delay he perform the covenant." Thus the common law began with two formal contracts: The written acknowledgment of indebtedness in a fixed sum, made under seal and the written promise of some performance, likewise made under seal. A third formal contract of the common law is the recognizance, a solemn oral acknowledgment of indebtedness made in open court and put in the record.³² To these older formal contracts there were added later what Ames aptly termed mercantile specialties, i.e., bills of exchange and promissory notes, taken over from the law merchant.³³

There was also at common law an old category of "warranties," that is, promissory representations incidental to other transactions. Actions were brought upon them on a theory that a breach was wrong. But they came to be thought of analytically from the standpoint of contract and may be sued on either *ex delicto* or *ex contractu*,³⁴ something which even now makes trouble in connection with statutes of limitations.³⁵

But the significant development of the law of contracts followed the enforcement of simple contracts, that is, agreements not in the form of speciality or bailment, by an action of assumpsit, in form *ex delicto*, for the wrong in not performing a promise exchanged for an act or for another promise.³⁶ Thus there came to be a great extension of the area of legally enforceable promises and agreements. But as this extension was made by development of an action on the case, upon a theory of a tort, the exigencies of an action *ex delicto*, made to afford a remedy *ex contractu*, imposed on the common law of contracts the doctrine of consideration.

Lord Mansfield, Lord Chief Justice of the King's Bench, 1756-1784, sought to establish and came very near establishing that no promise in writing and no business promise should be *nudum pactum* for want of consideration.³⁷ This was in line with the eighteenth century law of nature thinking and the civil law of the time with which he was familiar. But a reaction set in after his time and it was not until the present century that a new tendency to extend the sphere of legally enforceable promises showed itself in common-law jurisdictions. Such a tendency is manifestly going on today through growth of exceptions to the requirement of consideration, through stretchings of the idea of consideration and through strained interpretations of transactions so as to bring them within recognized categories.

Ames spoke rightly of the "mystery of consideration." Its nature, its definition, the reason for it, and its history have been and still are subjects of much dispute. The latest American work on contracts³⁸ substantially gives it up, holding that there is no general idea but there are a great many rules for particular states of fact. Certainly, as things are today, the term does not have one settled meaning in the law of simple contracts. Nor does it have the same meaning in the law of contracts, in the law which grew up in connection with the statute of uses,³⁹ in the law of negotiable instruments,⁴⁰ and in equity.⁴¹ In the nineteenth century it was thought to have become settled that the common-law theory of enforcing simple contracts was one of giving effect to bargains. A simple contract was either an exchange of promises or an exchange of a promise for an act. In a bilateral contract each promise was the consideration for the other. In a unilateral contract the act was the consideration of the promisor. But not

every promise nor every act would be consideration. In the reign of analytical historical juristic thinking it became the orthodox theory that detriment to the promisee was the significant feature of consideration. It met the demands of historical derivation from an action of trespass on the case and the course of decision in the nineteenth century for the most part could be fitted to it. The promise exchanged for the promisor's promise must be something the promisee was not bound to do and so a detriment to him. The act exchanged for a promise must be one the promisee was not already bound to do. Moreover it had to be something done in exchange for the promisee when made, not something done in the past and so not done as part of a bargain. Under the influence of the equivalent theory, benefit to the promisor, which was historically behind the action of *indebitatus assumpsit*, was often urged as an alternative and as a left over from the natural-law thinking of the eighteenth century there were cases which went on a doctrine of moral consideration.⁴² But these analytical anomalies were rejected or explained away. In England this theory of a simple contract has been adhered to consistently in refusing to recognize consideration moving from a third person⁴³ or promises for the benefit of a third person⁴⁴. Williston says, truly, that English law at this point "at least has the merit of definiteness."⁴⁵ In the United States dissatisfaction with the practical result of the orthodox theory led to recognition of the idea of benefit to the promisor as one form of consideration with the result that consideration moving from a third party could be recognized and a settled course of decision upholding contracts for the benefit of a third person could be brought into line with the theory.⁴⁶ This has proved to be only part of a progressive relaxation of the requirement of consideration.

None of the theories of consideration will explain the actual course of decision in common-law jurisdictions today.⁴⁷ Indeed the Restatement by the American Law Institute recognizes a catch-all category of "informal contracts without assent of consideration."⁴⁸ The condition of the law as to simple contracts is made especially serious by the tendency to reduce all contracts to that one category. The informality of pioneer America led to a progressive deterioration of the seal as a symbol of deliberate acknowledgment. One was estopped to deny what he had formally recited under seal. But it came to be regarded as the merest form. An impression on paper,⁴⁹ a wafer without impression,⁵⁰ a scroll made with pen and ink,⁵¹ the word "seal" written or printed,⁵² the letters "L.S.,"⁵³ or a mere dash following the signature,⁵⁴ were held enough. Although a few states were some-what stricter, no less than twenty adopted most or all of these informal equivalents.⁵⁵ Moreover, twenty-seven states have done away with the distinction between sealed and unsealed written contracts.⁵⁶ In six others a seal does no more than raise a presumption of consideration,⁵⁷ but this presumption has now been done away with in New York.⁵⁸ An unfortunate condition of the law in a great part of the country has resulted in that there is no way of making a legally binding promise otherwise than as part of or in the form of a bargain. The Uniform Written Obligations Act, recommended by the National Conference of Uniform State Laws as a remedy has been adopted in two states only.⁵⁹ At the same time, contrary to what seems to have been the original rule, the mercantile specialties, as between the original parties, have been made to require consideration,⁶⁰ bail

bonds have largely replaced recognizance,⁶¹ and courts of equity, where a promise under seal is enforceable at law without consideration, have refused specific performance of a "voluntary" promise.⁶² In practical effect, in more than half of the United States all contracts have been reduced to the simple contract requiring consideration.

English courts have had to strain the law of trusts and work out implied assignments in order to avoid hard results from refusal to recognize contracts for the benefit of third persons as creating rights in the latter.⁶³ In like manner American courts have been and are increasingly straining to get away from the exclusive bargain theory and the requirement of consideration.

In the United States there are now at least fifteen recognized exceptions which may be grouped under four heads.

A first head is what is called promissory estoppel. Here there is no true estoppel. There is action afterward on a gratuitous promise which was not part of a bargain when made. These are not cases of making good an appearance of anything. They are cases of intent to make a gratuitous promise. There are two types. One is subscription promises. It used to be said the promise of each was consideration for the promise of the others.⁶⁴ But obviously there is no exchange of promises among the subscribers. More recently these subscriptions have been held enforceable after the promise has begun to act on them, either under a sort of theory of estoppel or by treating the promise of the subscriber as a sort of offer, accepted when the promise begins to act.⁶⁵ In Pennsylvania it has been said that acceptance of the subscription by a church or charitable institution is consideration.⁶⁶ Here in order to avoid the requirement of consideration the promise is turned into an offer toward an exchange of promises. So far as these cases go on any theory other than the keeping of promises, they may be referred to the injurious reliance theory. The other type is gratuitous promises of single individuals afterwards acted on.⁶⁷ They purport to go on the injurious reliance theory of consideration but, as there was no exchange of the promise for the subsequent action, they are not consistent with the bargain theory of contract. The case of gratuitous promises to procure insurance, stated at the outset, is of this type and it will have to be considered more fully later.

A second head is "moral consideration," that is, treating a reason in morals for making a promise as a reason for legal enforcement of it. No less than five types of cases belong here. They will be numbered consecutively after the first two stated, putting them as exceptions to the bargain-consideration idea.

A third exception is to be seen in promises made in recognition of moral obligation arising from receipt of some material benefit without any original legal liability. Here although there is no bargain, no injurious reliance, and no antecedent legal liability which has become unenforceable, there is often held to be a contract.⁶⁸

Fourth may be put new promises where a debt is barred by limitation or discharge in bankruptcy or the like.⁶⁹ These cases have sometimes been explained by referring them to waiver-the intentional relinquishment of a known right. Waiver might be referred to estoppel or to contract.⁷⁰ But it seems more and more to be treated as a legal transaction in which the

courts give the intended effect to the will of the one who acts, requiring neither the elements of estoppel nor consideration.⁷¹

Fifth are the cases of defective execution of an intention to secure a creditor, settle property on a wife, or provide for a child. These are reformed in equity in a way that amounts to specific performance.⁷² There is even some authority for treating cases of this sort as enforceable directly in equity.⁷³

Sixth may be put the case of a defectively executed conveyance made to recognize a moral obligation, which will be reformed so as to amount to specific performance on the theory that because of the prior benefit received by the grantor it is not specific enforcement of a "voluntary" promise.⁷⁴

Seventh and last under the second head, may be put a promise by a parent to a child that the child shall have his earnings free of the parent's claim. "It is in effect a promise to give up a right, which is binding if acted upon." No consideration and no seal is required.⁷⁵

A third head embraces what in Roman law are called *pacta donationis*, promises of a gift. It includes two more exceptions to the theory of bargain and consideration.

Eighth is a well known group of cases in which courts of equity torture gifts into contracts so as to enforce *pacta donationis* although the rule is supposed to be that equity will not aid one whose claim does not have a foundation in a common law consideration.⁷⁶

Ninth must be put gratuitous declarations of trust.⁷⁷ An oral gratuitous declaration of trust as to a chattel is binding. The result is significant. If I say "I give you this watch" but do not deliver it there is no gift. If I say "I will give you this watch at noon tomorrow," without more, the promise will have no legal effect. But if I say, "I hold this watch in trust for you," and continue in possession but clearly indicating it as the trust *res*, I can be made to deliver it as held in a dry trust.

Finally under a fourth head, intention to be bound in a business transaction, we may put six and perhaps seven exceptions with good authority behind them.

Tenth is the case of option under seal without consideration. Here, although courts of equity are accustomed to say they will not aid a volunteer and will not grant specific performance of a contract under seal where there is no common law consideration, yet they in effect grant specific performance of a collateral contract under seal to keep the offer open for the time specified or else treat the option as a unilateral contract under seal on condition of exercise of the option within the time fixed. In either event they grant specific performance of a contract under seal although without consideration.⁷⁸

Eleventh we may note waiver of claim or defence where there is no moral duty involved. There are many cases of this sort where a promise as a business transaction is upheld without consideration. Examples are: Waiver of a claim,⁷⁹ waiver by a surety of his defence of release by extension of time to the principal,⁸⁰ consent to a breach of trust,⁸¹ even after breach,⁸² waiver of breach of condition by promise to perform notwithstanding,⁸³ promise to perform all or part of a contract procured by fraud or otherwise voidable, where not avoided before the new promise.⁸⁴

Twelfth, in some states, release by mere acknowledgement of performance will operate without seal or consideration.⁸⁵ At common law release was thought of as in the nature of a conveyance and so was required to be by deed under seal. Equity would enforce specifically a covenant not to sue and that came to be an equitable defence at law and to operate as a discharge without resort to equity. Thus it came to be that release called for seal or consideration. But the same idea which led to making waiver an independent legal transaction led the courts in some jurisdictions to give effect to release by mere acknowledgement of satisfaction without consideration.

Thirteenth, stipulations, agreements of parties or their attorneys or counsel with respect to conduct of and proceedings in litigation require neither seal nor consideration.⁸⁶

Fourteenth, the present generation has seen the recognition in American courts of a doctrine of mandate with no *res*. In Roman law, mandate (a commission to do something for another gratuitously) was a consensual contract. As the common law had no category of consensual contracts, we could only recognize a bailment of mandate, an undertaking to do something for another gratuitously with respect to some chattel delivered by the one to the other.⁸⁷ If without any bailment one promises to do something for another gratuitously and having begun to carry out his undertaking, performs it negligently or negligently leaves it off incomplete, he is liable in an action on the case.⁸⁸ But suppose he forgets and neglects to do anything? Here it has been taken that the action would have to be *ex contractu*. Notwithstanding the want of consideration, a number of courts recently have allowed the action.⁸⁹ There is no bargain here, and no act in reliance.

A fifteenth exception may be seen in letters of credit not under seal and not upon consideration, which are given effect when acted on. Sometimes this is done on a theory of estoppel,⁹⁰ and sometimes on a theory of an independent transaction of the law merchant⁹¹ requiring no consideration except between the immediate parties.⁹² At any rate, it has been well said: "Throughout the cases we may note the courts feeling, more or less subconsciously, that we have here a substantive institution of the law merchant, which ought to be sustained on its own basis; and that whatever common-law theories may be convenient for the purpose are to be resorted to in order to fortify it. It is significant that no deliberate written promise of a business man or commercial entity, made as a business transaction, to answer for credit extended on the basis of the writing has failed of enforcement in our courts."⁹³

It is quite possible that we should add another exception. Composition agreements with several creditors have universally been held binding on the theory of consideration first suggested as to subscription contracts. As Williston said in his first edition, "the doctrine that promises in composition agreements are supported by valid consideration must be regarded as exceptional."⁹⁴ Also we must note the tendency to break away from the requirement of consideration where a less sum than a liquidated sum now due is accepted in full satisfaction.⁹⁵

Have not the exceptions swallowed the rule? Should not a legal requirement growing out of the exigencies of medieval procedure, which leads to so many unhappy results,⁹⁶ is so

difficult of definition that it has been the subject of endless debate,⁹⁷ and in the best form in which a group of legal scholars could put it was put subject to so many exceptions,⁹⁸ be recognized as an anachronism and done away with?⁹⁹ It is significant that the English Law Revision Committee, to which the question of consideration was referred by the Lord Chancellor, so recommended.¹⁰⁰

Coming back now to the problem stated at the outset, how shall we deal with it as the law stands today? As has been seen a few American courts have taken the bull by the horns and found a mandate without a *res*.¹⁰¹ The American Law Institute found a way round, although by no means a clearly marked path. It formulated this as a recognized proposition of the American law of contracts :

“A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which induces such action or forbearance, is binding if injustice can be avoided only by enforcement of the promise.”¹⁰²

This is an adoption of the “promissory estoppel” theory of consideration or the injurious reliance theory of what constitutes a contract. Although in 1920, twelve years before. Section 90 of the Restatement was published, Professor Williston was able to cite two decisions of the House of Lords, one of the Supreme Court of the United States and nineteen decisions of the highest state courts in fifteen states for the proposition that “a detriment incurred in reliance on a promise is not valid consideration unless the detriment was requested as a consideration”¹⁰³ by 1948 sixteen states and half of the federal circuits had followed the section in decision or dictum.¹⁰⁴ Obviously the courts have welcomed an escape from the bargain theory and its consequences even though it had been proclaimed in characteristically striking phrase by Mr. Justice Holmes as late as 1903.¹⁰⁵ “Promissory estoppel” is not a satisfying substitute for consideration. There is nothing in these cases within any proper use of that grossly overworked term estoppel, too often used as what William James used to call a solving word brandished at difficult problems as Habib in the Arabian Nights waved his scimiter and cried out the magic word, whereupon forthwith all obstacles vanished and all enemies were paralyzed. The Restatement cannily avoids referring its proposition to estoppel or to any general principle but gives us a more satisfactory result than the requirement of consideration afforded but does so after the manner of legislation by a rule for a particular type of case. But it has not too much confidence in its rule, qualifying it in application by providing it shall only be invoked where injustice cannot otherwise be avoided. This qualification, appropriate for equitable remedies where there is an alternative remedy at law, is a doubtful expedient in the law of contracts where we are not dealing with added security to interests recognized and protected by ordinary legal remedies. Moreover, contract is a fundamental institution of the economic order.

In an ingenious article entitled, “Reliance on Gratuitous Promises”¹⁰⁶ Professor Seavey tells us that there are three possible ways of dealing with a case where there has been a failure to perform a gratuitous promise made in good faith and relied upon by the promisee. One is the course taken by Chancellor Kent and the orthodox theory of contract in the common

law in the nineteenth century. This, he says rightly, is not consistent with modern reasoning.¹⁰⁷ A second is the rule of § 90 of the Restatement of Contracts. This, he says, “frankly recognizes the reliance element in the law of contracts and, to a modified extent, substitutes reliance for the bargaining element without which simple contracts are not normally enforceable.” “By its limitation,” he adds, “to those situations in which justice cannot be done if the rule is not used, it properly indicates the use of equitable principles and is a warning against its indiscriminate use in non-bargaining transactions.”¹⁰⁸ But is it wise to retain the requirement of a bargain as the normal principle and then provide for a quasi-equitable departure and special rule where justice cannot be done otherwise. It is often difficult enough to evaluate degrees of hardship in connection with equitable remedies in the concurrent jurisdiction of equity. To make such valuation the criterion of enforceability of a promise may lead in the direction of Section 406 of the Soviet Civil Code and make decision depend on the relative economic position of the parties.

The hard way of dealing with the situation according to Professor Seavey, is to use principles of the law of torts rather than of contract. He says that the rationale of Section 90 of the Restatement of Contracts is “that justice requires the defendant to pay for the harm caused by foreseeable reliance upon the performance of his promise. The wrong is not primarily in depriving the plaintiff of the promised reward but in causing the plaintiff to change position to his detriment.”¹⁰⁹ But the law of torts is burdened today with enough new problems without shifting to it difficult problems of enforcing promises. He admits that there is no statement in the Restatement of Torts which deals with this type of situation. A very considerable re-adjustment of tort doctrine will be required and one may question whether that will be worth the effort so long as there is a simpler and easier way out to which what is increasingly the course of judicial decision will adjust itself without effort.

It is submitted that the wise course is simply to abrogate the requirement of consideration. This will turn from fifteen to seventeen supposed exceptions into ordinary cases of a principle of the binding force of a promise, and will clear away a mass of confusion which the jurists of Continental Europe have escaped. If it be said how shall we know what makes an enforceable promise if we cease to call for either form or consideration, my answer is by inquiring whether the asserted promise was made as a serious declaration of intention which the promisor expected the promisee to accept as such and himself to preform. It should be enough to hold it to the general requisites of a legal transaction.

Footnote

1. Johnson (N.Y.) 84.
2. Ibid. 97.
3. *Ld. Raym.* 909 (1703).
4. As to these jural postulates of civilization see Pound. *Social Control Through Law*, 112-118.
5. Mitteis, *Ueber die Herkunft der Stipulation in Festschrift für Bekker*, 107-142 (1907).
6. *Gaius*, iii. § 93.

7. Ibid. §§ 128-133.
8. Gaius, ii. § 60.
9. Buckland, *Text Book of Roman Law* (2 ed. 1932) 463.
10. Ibid. 467.
11. Digest, xix, 5, 5 pr.
12. Buckland, *Text Book of Roman Law* (2 ed. 1932) 529.
13. Viard, *Les pactes adjoints en droit, classique* (1928).
14. Buckland, *op. cit.* 530-533.
15. Institutes, iii. 19, 12.
16. Andreas ab Exea (16th century jurist) *De pactis*, 294, 296, in 6 *Tractatus Universi Juris*, pt. 2, fol. 9: Caccialupi (jurist, died 1496) *De pactis*, xi, 7, 6, in 6 *Tractatus*, pt. I, fol. 13: Duarenus (French Jurist, 1509-1559) *De pactis*, vi, I, in 6 *Tractatus*, pt. I, fol. 15.
17. Antonius Corsetus Siculus (15th century canonist) *De iuramenti et eius privilegiis*, no. 70, in 4 *Tractatus*, fol. 364: Gulielmus Redoanus (16th century Bishop of Nebio in Corsica) *De simonia mentali*, ii, 4, 15, in 15 *Tractatus*, pt. 2, fol. 60, no. 15.
18. *Les lois civiles dans leur ordre naturel* (1635) i, I. § I. nos. 5, 6.
19. *Traité des obligations* (1761) i, I, I, § I.
20. See Planiol, *Traité élémentaire de droit civil* (II ed. 1930) nos. 1026-1046: Capitant, *De la cause des obligations* (3 ed. 1927).
21. Lee, *Introduction to Roman-Dutch Law* (3 ed. 1931) 230-233, 427-434.
22. Gloag and Henderson, *Introduction to the Law of Scotland* (3 ed. 1939) 37.
23. Planiol, *Traité élémentaire de droit civil* (II ed. 1930) nos. 1037, 1039. See also Amos and Walton, *Introduction to French Law* (1935) 1634.
24. Schuster, *Principles of German Civil Law* (1907) § 140, Swiss Code of Obligations § 15: 2 Planiol, *Traité élémentaire de droit civil* (II ed. 1930) no. 1047.
25. Bk. x, cc, 1-14.
26. Fitzherbert, *New Natura Brevium* (8 ed. 1755) 273, 357.
27. Ibid, 323, 357.
28. Maitland, *Bracton's Note Book* (1887) pl. 859, p. 668.
29. Ames, *Lectures on Legal History* (1913) 116.
30. Baildon, *Select Civil Pleas, 1200-1225*, Selden Society Publication for 1890, pl. 89.
31. Pollock and Maitland, *History of English Law* (2 ed. 1898) 219.
32. It is known from 1201, 2 Pollock and Maitland, *History of English Law* (2 ed. 1898) 203-204.
33. Ames, *Cases on Bills and Notes* (1881) 872-878.
34. Ames, *Lectures on Legal History* (1913) 226 ff.
35. *Blessington v. McCrory Stores Corp.* 305 New York, 140 (1953).
36. Ames, *Lectures on Legal History* (1913) 129-165: id. *The History of Assumpsit* (1888) 2 *Harvard Law Rev.* I. 53.

37. *Pillans v. Van Microp*, 3 Burr, 1663, overruled in the House of Lords in *Rann v. Hughes*, 7 T. R. 350, n.
38. I Corbin, *Contracts*, §§ 193-209, particularly §§ 206 and 257 on p. 857.
39. "Good consideration", "Natural love and affection." Here desire to perpetuate a family was held a good reason for raising a use. *Sharington v. Strotton*, 1 Plowd, 287 (1565).
40. Ames, *Cases on Bills and Notes* (1881) 876-878. American Negotiable Instruments Law § 25.
41. Pound, *Consideration in Equity*, *Wigmore Celebration Legal Essays* (1919) 13 *Illinois Law Rev.* 667.
42. This analytical historical theory consideration is discussed thoroughly in Langdell. *Selection of Cases on the Law of Contracts* (2 ed. 1879) Summary, §§43-48, published separately as *Summary of the Law of Contracts* (1880): Leake, *Elementary Digest of the Law of Contracts* (1878) 605-631.
43. *Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co.* (1915) A.C. 847.
44. *Ibid.* See also *Cleaver v. Mutual Reserve Fund Life Assn.* (1892) 1 Q.B. 147, 152.
45. Williston, *Contracts* (2 ed. 1936) § 360.
46. Williston, *Contracts* (2 ed. 1936) §§ 102, 114: American Law Institute, *Restatement of Contracts* (1932) § 75.
47. The theories are exhaustively discussed in I Williston. *Contracts* (2 ed. 1936) §§ 100-103G, and by Judge Pawate in a very interesting book. *Contract and the Freedom of the Debtor in the Common Law* (1953) chap. 4.
48. *Restatement of Contracts* (1932) § § 85-94.
49. *Beardsley v. Knight*, 4 Vt. 171 179 (1832) English courts have been willing to go that far: *In re Sandilands*, L.R. 6 C.P. 411 (1871).
50. *Tasker v. Bartlett*, 5 Cush. 359. 364 (Mass. 1850). Massachusetts has now by statute made a recital that the instrument is sealed sufficient. Mass. Acts. 1929. c. 377. § 2.
51. "From the earliest period of our judicial history a scrawl has been considered as a seal." *Trasher v. Everhart*, 3 Gill & J., 234- 246 (Maryland).
52. *Jeffery v. Underwood*, 1 Ark. 108 (1838).
53. I.e., loco sigilli, "in place of a seal." *Jacksonville M. P. R. & N. Co. v. Hooper*, 160 U.S. 514, 518-519 (1896).
54. *Hacker's Appeal*, 121 Pa. 192, 202-205 (1888).
55. I Williston, *Contracts* (2 ed. 1936) § 202.
56. *Ibid.* § 218.
57. *Ibid.*
58. Civil Practice Act of 1920 as amended in 1935.
59. Reeve, *The Uniform Written Obligations Act*.
60. 2 Ames, *Cases on Bills and Notes* (1881) 876-878.
61. I Williston, *Contracts* (2 ed. 1936) § 220.
62. That is, one not part of a bargain. *Jeffreys v. Jeffreys*, Cr. & Ph. 138 (1841) contrary to older cases in chancery and followed in the United States where the sealed instrument recited a

G-146842

- consideration but there was none in fact. *Lamprey v. Lamprey*, 29 Minn. 152 (1882); *Graybill v. Brugh*, 89 Va. 895 (1893).
63. *Moore v. Darton*, 4 DeG. & Sm. 517 (1851); *Caven v. Canadian P.R.* (1925) 2 Dom. L. R. 845 (P.C.).
 64. *Allen v. Duffie*, 43 Mich. I. 4 (1880).
 65. *Young Men's Christian Assn. v. Estill*, 140 Ga. 291 (1913); *Brokaw v. McElroy*, 162 Ia. 288 (1913); *Cottage St. Church v. Kendall*, 121 Mass. 528 (1877); *Keuka College v. Ray*, 167 N. Y. 96 (1901); *Irwin v. Lombard University*, 56 Ohio St. 9 (1897); *U. of Pa. Trustees v. Cox's Executors*, 277 Pa. 512 (1923). The English courts refuse to enforce such promises. In re Hudson. 54 L. J. Ch. (N.S.) 811 (1885). So also in Canada. *Dalhousie College v. Boutelier* (1934) Can Sup. Ct. 642.
 66. *Board of Foreign Missions v. Smith*, 209 Pa. 361 (1904).
 67. *Switzer v. Gertenbach*, 122 Ill. App. 26 (1905); *Ricketts v. Scothorn*, 57 Neb. 51 (1898).
 68. *Holland v. Martinson*, 129 Kan. 43 (1915); *Muir v. Kane*, 55 Wash. 131 (1909).
 69. Restatement of Contracts, § 86, 87.
 70. Ewart, *Waiver Distributed Among the Departments Election, Estoppel, Contract, Release* (1917) chap. 1.
 71. That element of estoppel not necessary, *Kirman v. Dutchess County Mut. Ins. Co.* 150 N.Y. 190, 195 (1896); *G. S. Johnson Co. v. Nevada Packard Mines Co.*, 272 Fed. 291, 305 (1920); *Hayes v. Monning*, 263 Mo. 1. 45-46 (1914). That the consideration required to support a simple contract is not necessary. *G. S. Johnson v. Nevada Packard Mines Co.*, supra; *Pabst Brewing Co., v Milwaukee*, 126 Wis. 110, 114-116 (1905). Compare a promise to perform a promise obtained by fraud. Restatement of Contracts, § 89. This seems to establish waiver as a legal transaction requiring no consideration. There is not even "moral consideration" in such a case.
 72. See Pound, *Consideration in Equity*, *Wigmore Celebration Essays*, 435, 443-444 (1919) and cases there cited.
 73. See 2 Story, *Equity Jurisprudence* (13 ed. by Bigelow, 1886) § 753b, 120, n. 1.
 74. *Legate v. Legate*, 249, 111. 359, 364-365 (1911).
 75. See Warren, *Husband's Right to Wife's Services* (1925) 38 Harv. Law Rev. 421, 425.
 76. *Ungley v. Ungley*, 5 Ch. D. 887 (1877); *Ferry v. Stephens*, 66 N. J. 321 (1876); *Freeman v. Freeman*, 43 N. Y. 34 (1870). See also the torturing of a gift into a contract in order to make it enforceable at law. *Allegheny College v. National Chautauqua Country Bank*, 246 N. Y. 369 (1927). Here the dissenting opinion shows what the court actually does. See Pound, *Consideration in Equity*, *Wigmore Celebration Essays* (1919) 435, 439-440.
 77. *Ex parte Pye*, 18 Ves. 140 (1811). American cases in accord may be found in I Scott, *Trusts* (1939) § 28, p. 177, n. 4.
 78. See McGovney, *Irrevocable Offers* (1914) 27 Harvard Law Rev. 644, 646-647, and cases cited on 646, n. 5.
 79. *McCue v. Silcous*, 122 N. J. Law, 12 (1939).
 80. *Bank at Decatur v. Johnson*, 9 Ala. 622 (1846); *Porter v. Hodenpuy*, 9 Mich. 11 (1860); *Fowler v. Brooks*, 13 N.H. 240, 245 (1842); *Bramble v. Ward*, 40 Ohio St. 267, 269 (1883).
 81. *Lannin v. Buckley*, 256 Mass. 78, 82 (1926).

82. *Preble v. Greenleaf*, 180 Mass. 79, 82-83 (1901).
83. Restatement of Contracts, § 88.
84. *Ibid.* § 89.
85. *Green v. Langdon*, 28 Mich. 221 (1873); *Gray v. Barton*, 55 N.Y. 68 (1873); *Carpenter v. Soule*, 88 N.Y. 251 (1882).
86. Restatement of Contracts, § 94.
87. Story, Commentaries on the Law of Bailments (1832) § 137.
88. *Wilson v. Brett*, 11 Meeson & Welsby, 113 (1843); *Hammond v. Hussey*, 51 N. H. 40 (1871).
89. *Maddock v. Riggs*, 106 Kan. 808 (1920); *Kirby v. Brown*, 229 App. Div. 155 (N.Y. 1930); *W.B. Saunders Cl. v. Galbraith*, 40 Ohio App. 155 (1931).
90. *Johannessen v. Munroe*, 152 N.Y. 641 (1899); *Hershey, Letters of Credit*, 32 *Narvard Law Rev.* 1, 16-19 (1918).
91. *McCurdy, Commercial Letters of Credit*, 35 *Harvard Law Rev.* 539, 574 ff. (1922).
92. *Border National Bank v. American National Bank*, 282 Fed. 73, 79 (1922).
93. *Hershey, Letters of Credit*, 32 *Harv. Law Rev.* 1, 19-20 (1918). See also *Gutteridge, The Law of Bankers' Commercial Credits*, 23-28 (1932).
94. *I Williston, Contracts* (1 ed. 1920) § 120, p. 270. But compositions under the Bankruptcy Act are a matter of statute.
95. *Gaston v. Savin*, 137 Ohio St. 551 (1941).
96. See *Wigmore's note in 3 Ill. Law Rev* 461-462 (1908) and *Lord Dunedin's comment in Dunlop Pneumatic Tyre Co. v. Selfridge & Co.* (1915) A.C., 847, 856.
97. *Ames, Two Theories of Consideration*, 12 *Harvard Law Rev.* 515 (1899), 13 *id.* 129; *Anson, Contracts*, 80 (1880); *Ashley, The Doctrine of Consideration*, 26 *Harvard Law Rev.* 429 (1913); *Ballantine, Mutuality and Consideration*, 28 *Harvard Law Rev.* 121 (1914); *Ballantine, Is the Doctrine of Consideration Senseless and Illogical?* 11 *Michigan Law Rev.* 423 (1913); *Beale, Notes on Consideration* 17 *Harvard Law Rev.* 71 (1903); *Gardner, An Inquiry Into the Principles of the Law of Contracts*, 46 *Harvard Law Rev.* 1, 9-12, 23-24 (1932); *Holdsworth, The Modern History of Consideration*, 2 *B.U. Law Rev.* 87, 142 (1922); *Langdell, Mutual Promises as a Consideration for Each Other*, 14 *Harvard Law Rev.* 496 (1901); *Lorenzen, Causa and Consideration in the Law of Contracts*, 28 *Yale Law Journ.* 621 (1919); *McGovney, Irrevocable Offers*, 27 *Harvard Law Rev.* 644 (1914); *Pawate, Contracts and the Freedom of the Debtor in the Common Law*, chap. 4 (1953); *Pollock, Contracts* (10 ed. 1936) 164-193; *Pound, Consideration in Equity*, 13 *Illinois Law Rev.* 667 (1919); *Pound, Introduction to the Philosophy of Law*, 271-282 (1922); *Whittier, The Restatement of Contracts and Consideration*, 18 *California Law Rev.* 611 (1930); *Wigmore, The Scientific Role of Consideration in Contracts, Legal Essays in Tribute to Orrin Kipp McMurray*, 641 (1935); *Williston, Consideration in Bi-Lateral Contracts*, 27 *Harvard Law Rev.* 503 (1914); 1 *Williston, Contracts* (2 ed.) § § 100-104 (1936).
98. Restatement of Contracts, § § 75-84, 85-94 (1932).
99. 8 *Holdsworth, History of English Law* (2 ed. 1937) 47-48; *Lord Wright, Ought the Doctrine of Consideration to be Abolished from the common Law?* 49 *Harvard Law Rev.* 1225 (1937).
100. *Law Revision Commission, Sixth Interim Report* (1937). Compare the *New York Real Property Law*, § 279 which makes five exceptions to the requirement of consideration.

101. See ante note 89.
 102. Restatement of Contracts, § 90.
 103. I Williston, Contracts (I. ed.) § 139, note 27, pp. 308-309.
 104. The cases are collected in the 1948 supplement to the Restatement, p. 196. See also Promissory Estoppel in California, 5 Stanford Law Rev. 783 (1953).
 105. Wisconsin & M.R. v. Powers, 191 U.S. 379, 386.
 106. 64 Harvard Law Rev. 913 (1951).
 107. Ibid. 925.
 108. Ibid.
 109. Ibid. 926.
-

“LEGAL IDEAS UNDERLYING RELIGIOUS AND CHARITABLE TRUSTS AMONGST THE HINDUS”

Mr. Justice Bijankumar Mukherjea

M.A., D.L., at the second session of the Legal Conference held on the 20th March, 1943.

Religious and charitable trusts exist in some shape or other in almost all systems of civilised Jurisprudence and their origin can be traced primarily to the instincts of piety and benevolence which are implanted in human nature. The forms of the trusts differ according to the spiritual and moral ideas of different nations and even among the same people the ideas seem to vary—often to a considerable extent—at different stages of their religious and political history. Thus Imperial Rome under the Christian Emperors was dissimilar in many respects to Pagan Rome and there were profound changes in English social and religious institutions when England abjured Catholicism and became Protestant. The popular Hindu religion of modern times is not the same as the religion of the *Vedas* though the latter are still considered to be the ultimate source and authority of all that is held sacred by the Hindus. In course of its development the Hindu religion like all other religions did undergo transformation, and these changes reacted on the social system and introduced alterations in religious and charitable institutions. In spite of these changes, however, the fundamental, moral and religious ideas of the Hindus which lie at the root of their religious and charitable institutions have remained practically the same and the system that we see around us can be regarded as an evolutionary product of the spirit and genius of the people passing through various phases of cultural development.

It strikes anomalous to many people, particularly to European scholars, that in spite of the magnificent temples and the rich religious institutions that are spread all over India the subject of endowment should receive a most niggardly treatment in the hands of the Hindu Law-givers. It is not one of the eighteen topics of litigation, into which the sphere of substantive law has been divided by Hindu jurists and commentators even since the days of *Manu*. There is no statement of law directly on the subject in any of the *Smriti* works. Stray passages having only an incidental bearing on the matter occur here and there in the midst of dissertations on other topics, and no workable law can be constructed on the basis of scanty materials like these. Some of the later commentators have indeed paid a little more attention to the subject and they have drawn largely on *Pauranic* literature, but what they talk of is not law but religious rituals and it is often difficult to extricate any legal rule from a mass of religious rites and ceremonies.

The paucity of texts on the subject of Endowment is explained by the fact that in India much was left to customs, or unwritten usages whose authority and binding force were on a par with written texts of law. *Manu* lays it down as one of the duties of the King to enquire into the particular laws and usages of classes, communities and societies and adhere to them if they are not repugnant to the laws of God (*Manu*, Ch. VIII, verse 41). Having regard to the extreme conservatism of Hindu society it could fairly be expected that the people who were in charge of administering the benefactions did not go against the traditions and usages which grew up in respect of the same; and it was only in extreme cases when the waste or maladministration was of a scandalous character that the interference of the ruling authority was sought for.

I will endeavour in the present discourse to analyse the fundamental ideas underlying charitable and religious trusts among the Hindus and express them in the language of modern jurisprudence. It is necessary that we must start with a clear idea of what is meant by the expression "religious and charitable trust." In ordinary language the words would mean a trust created of religious or charitable purpose. Two things, therefore, require to be considered, namely, first what are religious and charitable purposes? And what is a trust?

Now religion is a matter of faith with individuals or with communities and it is not necessarily theistic, e.g., Buddhism. All that we understand by religious purpose is that the purpose or object is to secure the spiritual well-being of the person or persons according to the tenets of the particular religion which he or they believe in. This may imply belief in a future state of existence where a man reaps the fruits of pious acts done in this world, and it may be connected with the ideas of atonement for past errors of a man and that of making peace with his Maker.

By charity on the other hand is meant benevolence, and in its wide popular sense it comprehends all forms of benefit: physical, intellectual, moral or religious, bestowed upon persons, who are in need of them. In English Law, the word charity has a technical meaning and whether a purpose is charitable or not has got to be ascertained with reference to the preamble of the well-known statute of Elizabeth (43 Elizabeth, Ch. IV). In England, religious trust forms part of and is included in charitable trust which is synonymous with public trust.

Let us now come to the other point and see what is meant by trust. The conception of trust in its technical sense was devised by the Chancery Courts of England which as courts of conscience attempted to supply the deficiencies of the English Common Law by administering what are known as principles of Equity and natural justice. These principles were imported to a large extent from the Roman Civil Law, and the procedure adopted by the Equity Courts was modelled on that of the ecclesiastical tribunals, the principal feature being the writ of *sub poena* by which an unscrupulous defendant, who could not be touched in the common law courts was compelled to appear before an Equity Judge and made to carry out his orders, the proceeding being entirely one in *personam*. Lewin in his well-known treatise, on the law of trusts defines trust to be a "Confidence reposed in some other not issuing out of the land,

but as a thing collateral annexed in privity to the estate of the land for which the *cestui que* trust has no remedy *by sub ponea* in the Chancery." This definition is not a happy one and has been criticised by many later writers on the subject including Underhill and Maitland. On the face of it the definition is inadequate for it is applicable to real estates only when there can be a trust of personal property as well. Moreover, it is not a correct statement of the law as it stands at present, the court of Chancery no longer existing as a separate court in England. Story defines a trust "to be an equitable right title, or interest in property real or personal, distinct from the legal ownership thereof." This again is a description not of trust but of the beneficial interest of the person in whose favour a trust is created; and the definition would serve quite well for any other kind of equitable estate or interest. It will be seen that the early writers always laid stress on the distinction between legal and equitable estates. The trustee has the legal estate and is in the eye of law the owner of the trust property; whereas the *Cestui que* trust has the beneficial or equitable interest in it, which prior to the Judicature Act, he could enforce only in a separate court. Modern English writers on the law of trust do not however lay stress on the trustee having a legal estate or his being the owner of the trust property. It is enough according to modern writers to constitute a person a trustee if he has control over the trust property or can exercise any powers in respect of the same and there is a duty on him to hold the property or exercise the powers for the benefit of other persons or for the accomplishment of some particular purpose: In Halsbury's "Laws of England" a trust has been defined to be "Confidence reposed in a person with respect to a property of which he has possession or over which he can exercise a power to the intent that he shall hold the property or exercise the power for the benefit of some other person or object." Thus it will be seen that the conception of trust in English Law is a highly artificial conception which had its foundation upon a dual system of law and a dual system of property which came into existence in England under peculiar historical and political conditions. No trust in this sense can possibly be expected in the Hindu system. But if you take trust in a broad and general sense as signifying a fiduciary relation under which a person in possession or control of any property is bound to use that property for the benefit of certain persons or specified objects obviously there are trusts in Hindu Law. A *Shebait* in charge of a temple or a *Mohant* having control over a religious institution would be a trustee in this general sense. The ownership of the trustee in English Law is a nominal or formal ownership and even if we discard the form it is not impossible to conceive of legal relations which have all the essentials of a trust proper.

A study of historical jurisprudence will convince us that different legal forms have been resorted to by different nations and even by the same people at different stages of history for the purpose of giving shape and effect to a particular legal idea, and the mistake we too often commit is to think that a particular legal form with which we are familiar in the present time is so self-evident and natural that it must have suggested itself to all other people and at all ages. No ancient nation could boast of a better and more perfect system of law than the Romans and it will be worth while to enquire what legal forms were adopted by the Roman lawyers for giving effect to their ideas of religious and charitable trusts.

In Roman Law property dedicated to gods formed a species of public property; they were *res extra commercium* and lay outside the pale of private law altogether. The conception was not that these properties vested in the gods or religious institutions as juristic persons but rather they were excluded from all private ownership and were regulated by administrative processes within the field of public law. The idea of a corporate or juristic personality as a new subject of rights and duties distinct from all its members was established in Rome during the later Republican and the early Imperial Period. Such corporate personality was attributed to the State and to its different departments as also to municipal bodies and other associations to whom this privilege was extended by the State. In early imperial period when Rome has not become Christian certain specific deities were given the status of juristic persons by special *senatus consulta* or imperial constitutions. These were the Tarpeian or Capitolian Jupiter, the Gaelic Mars, the Ephesian Diana, and so forth. When Rome became Christian, the church as part of the state was regarded as a juristic person and could be instituted as heir and became the recipient of gifts and legacies. Emperor Constantine authorised gifts to church by wills and the decrees of the later Emperors established that if any legacy was given to any of the ancient gods or to an archangel or martyr or a saint or if the testator instituted Jesus Christ as his heir the property would go to the Church.

One form of religious and charitable trusts recognised by the Romans was by gift of property to the church or an existing corporation and prescribing the way in which the income of the property was to be spent by the donee. The receiving corporation would be in the position of trustee and would be bound to spend the fund for the particular purpose. As a corporation never dies, the trust thus created would endure for ever. But another conception was introduced into Roman Law when the doctrine of *pia causa* was introduced. To create a juristic personality is the privilege of the state; no private person could do it. It was possible to do it, however, under the Roman Law when the property was devoted or given to a pious or charitable purpose. The moment a private person dedicated a property for charitable purpose, e.g., the benefit of the poor or the sick, the orphans or the aged people, he would according to the doctrine of *pia causa*, *ipso facto* create a new juristic person a new subject of rights and, duties and this person was the foundation or the institution itself, viz., the poor house or the hospital, as the case may be and the dedicated property would at once vest in that foundation. Thus the foundation would be the owner of the dedicated property and the administrators for the time being would be trustees bound to carry out the purpose of the trust (*Vide* Sohm's Institute of Roman Law, p. 203).

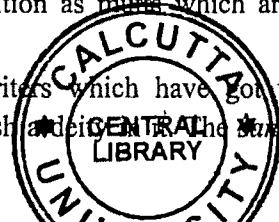
Let us see whether we can trace similar ideas in the writings of Hindu sages and law-givers. In the Hindu system as in other systems of law the idea of trust was an extension of the idea of gift; in fact the trust is nothing but a continuing or a perpetual gift. If a Hindu makes a gift to the priest who presides at certain ceremonies, or to a Brahmin on a pious occasion, or if a man gives alms to the poor at sacred places no idea of trust is possibly involved in these acts. But a trust undoubtedly arises, if property is dedicated to deity with a direction

that out of the income of the property the worship of the deity is to be carried out. Similarly when a dharamshala or annasatra is established or a dwelling house is given to a fraternity of monks a trust is brought into existence. Here property is set apart for a particular purpose and there is an obligation imposed upon somebody to hold it or spend its income for that purpose. According to *Devala* 'gifts' are of 4 kinds, viz., (1) *Dhruba* or perpetual, (2) *Ajasrika* which means daily charity, (3) *Kamyā* or gifts made with a particular object, and (4) *Naimittika* or gifts on special occasion, as for example during solar or lunar eclipse. A question of trust as said above can ordinarily arise with regard to *Dhruba* or perpetual gifts.

The common forms of Hindu religious endowments are temples, *mutts*, and institutions like *dharamsalas*, rest houses and *satras*, the object of which is to provide food and shelter to wayfarers and itinerant ascetics. Hindu piety and benevolence also manifest themselves in hospitals, schools, and dedication of tanks for the benefit of the public.

Whenever there is a dedication of property for any such purpose the first question that requires consideration is in whom the property dedicated vests after the donor has parted with his ownership in respect of the same. The other question is as to whether there is an idea of trust implied in such dedication and who occupies the position of a trustee in the different types of endowments? As I have said already there is no detailed discussion of the subject in any of the writings of the Hindu jurists and commentators, but some light is thrown upon it by the description of the different modes of dedication which are prescribed by the Brahminical writers with respect to different kinds of endowment. There are several writers who have dealt with this subject and reference may be made amongst others to Hemchandra Kamalakar, Nilkantha and Raghunandan. I will tell you shortly that in every act of dedication there are two parts: the first is *Sankalpa* or formula of resolve and the second is *utsarga* or renunciation. The ceremonies always begin with *sankalpa* and the donor after reciting the time of the gift with reference to age, year, season, month, day etc., states what object he has in making the gift. *Utsarga* on the other hand completes the gift by renunciation of the ownership of the founder in the thing given. The indispensable religious ceremony that is enjoined by the *Sastras* for completing the gift is that water must be poured on the hands of the donee. In case of *mutts* there are two forms of dedication prescribed by the commentators. The *Sankalpa* or the object of the donor may be to dedicate the *mutt* for the use of ascetics generally or it might be given to a particular holy man or a fraternity of monks. In case of the former although gift is made in the usual way by libation of water yet as there is no recipient of the gift, the offering of water is thrown on the ground or into an earthen pot. In the second class of cases the ascetic himself as representative of the congregation may receive the gift and the libation of water is thrown on his hand. *Dharamsalas*, rest-houses, *satras*, and similar establishments which are generally meant for the public occupy the same position as *mutts* which are not dedicated to a particular person or group of persons.

There are elaborate rituals prescribed by Brahminical writers which have got to be observed when a donor wants to consecrate a temple and establish a *mutt*. The *Sankalpa*



or the formula of resolve makes the deity itself the recipient of the gift and the usual formalities of gift are followed, the donor taking in his hands water, *kusagras* and other things. According to the Hindu jurists this ceremony diverts the ownership of the temple from the donor and vests in the idol. For the purpose of perpetuating this worship it is customary to make grants of land. Sometimes the gift is made to pious Brahmins as *Brahmotter* for carrying on the worship of the idol, but gifts of land are generally made to the deity also. In the *Vishnupuran*, it is said that the donor of land for worship of a deity attains the abode of the deity himself. Thus in all the different types of endowments, we get the purpose of the founder expressed in the *sankalpa* while the *utsarga* or renunciation divests the donor of his rights in the property. In whom then the property vests after dedication? When there is a specific donee, e.g., when the head of a monastic establishment accepts the gift on behalf of the congregation, the property might vest in the congregation or religious order itself as a juristic person and the head of the establishment for the time being might be clothed with the duties of administering the property, and using it for the benefit of the congregation. This was definitely the idea during the Buddhist period when the Buddhist *sangha* or congregation was regarded as a juristic person capable of holding property in the ordinary way. In the Buddhist chronicle, we have the instance of the dedication of *Jetavan bihar* to Lord Buddha by Anath Pindika, the most celebrated of his lay disciples. Anath Pindika had purchased the *Jetavan* park at Sravasti and built a splendid monastery upon it. On the day that Lord Buddha approached the city he was received with great pomp and on entering the precincts of the monastery he was asked by the merchant, "What, Oh Lord, shall I do with this *bihar*?" "Give it to the Sangha, past, present and future," so replied the Buddha, and Anath Pindika pouring water over the hands of Buddha pronounced the solemn formula of dedication. The master accepted the gift on behalf of the *Sangha* and celebrated in stanzas the advantages of a monastery. (See *Kern's Manual of Buddhism*, p.28). Thus the *Sangha* was a corporation and the words "past present and future" as used by Buddha bring out the essential characteristic of a corporation, viz., its immortality. The *bihar* of Buddhist times came to be the mutt of later ages the same formula of dedication and the formality of throwing water upon the hands of the donee are observed scrupulously even at the present day. We can say therefore that in case of a mutt dedicated to a particular fraternity of monks the congregation itself is the legal owner and the head of the order for the time being occupies the position of a trustee.

But when a mutt is dedicated for the use of ascetics generally or when a choultry or *dharamasala* is established for the benefit of all travellers and there is no particular donee who can receive the gift on whom would the ownership vest after dedication? According to *Vijnaneswar* gift consists in relinquishment of one's own rights and creation of rights of another, and the creation of others' rights is complete only on acceptance and not otherwise (*Mitakshara*, Ch. III, V and VI). According to *Dayabhaga* the gift is complete as soon as there is relinquishment in favour of a donee who must be a sentient being; concurrence of the donee is not essential (see Colebrooks's *Dayabhaga*, Ch. I, para. 21). But even according to *Dayabhaga*, if there is no acceptance of the gift by a sentient being the ownership would remain

in the donor. The position therefore is that no gift can take effect if no acceptance by a sentient being is possible. How can therefore a gift take effect when the founder dedicates a satra for feeding the poor or an asylum for the residence of travellers or builds a temple and dedicates it for the worship of an idol? In the first two cases there is no specific donee and in the third the donee is not a human being. The view of Hindu jurists seems to be that in case of gift to a deity for religious purposes no acceptance is necessary to complete the gift. The conditions of a valid gift as laid down by commentators apply to secular gifts only but even then the question remains unsolved as to who becomes the owner of the property after dedication. If it is *resnullius* it can be appropriated by anybody even though the man who appropriates it incurs sin, and the very object of the donor would be frustrated. On this point three views are possible. In the first place, the idol or the charitable foundation may be regarded as the owner. The second view is that the ownership may reside in the purpose itself. Thirdly, the ultimate beneficiaries may be looked upon as owners.

According to the principles of modern jurisprudence the bearer of a right must be a person. The theory that ownership can reside in the aim or purpose would go against this principle and would lead to the recognition of a subjectless right. There are writers indeed like Brintz, Bekkar, Duguit and other who argue that the maxim "no person, no property" is not a justifiable assumption and that property may belong to a purpose as well, without the purpose being given the status of a juristic person. But this theory is not countenanced by the majority of jurists and apart from its being inconsistent with well-established principles it leads to practical difficulties of a rather serious kind. Once the property goes out of the person and vests in the purpose, the whole thing is placed at the mercy of the State who can do whatever it likes with this masterless right, and there would remain no person entitled in law to enforce the intentions of the donor. On the other hand, if the State regards the foundation or institution itself which aims at carrying out certain purposes as a legal person, the latter acting through its agents can enforce the right. This was precisely the conception of the Roman lawyers.

It is difficult to say that according to Hindu lawyers the ownership of the dedicated property vests in the purpose or the aim. To support such a theory we have got to say that as soon as private ownership ceases, the State steps in, and assumes control over the dedicated property and it is for the State to decide in what way the intentions of the donor are to be given effect to. We do not find any such doctrine in the writings of Hindu jurists. The king indeed is spoken of as the protector of all religious and charitable institutions but he protects them in the capacity of a guardian and not because the property is ownerless.

The discussions of the several Hindu jurists on the other hand point to the conclusion that in case of property dedicated to a deity, the deity is regarded as the owner though not in the primary sense. In expression like *Devagram*, it is said by *Sulapani* that the donation having for its dative case gods like sun etc., can have only a secondary sense. *Sreekrishna* likewise observes that the expression cannot be use in the primary sense. The possessive case affix figuratively means abandonment for the gods. Therefore the expression is used in the

sense of a village which is the object of abandonment intended for the gods. On this point Savarswami says that *Devagram* and *Devakshetra* are figurative expressions (*Upachara*). What one is able to employ according to his desire is his property; the gods do not employ a village or land for their use. Whatever is given for the worship of gods is god's property.

From these discussions it is appellant that according to Hindu lawyers property dedicated for the worship of an idol belongs in a secondary sense to the idol. The ownership is indeed fictitious as the personality itself is fictitious; but it is something more than a mere figure of speech. It connotes a legal idea and all the incidents of legal personality are attributed to the deity.

With regard to *dharamsala*, *choultries*, *asylums* etc., which are dedicated for the benefit of the public generally and not to specified donees the proper view to take would be that the ownership is vested in the foundation or the institution itself as a juristic person. There is no discussion on this point anywhere in the writings of Brahminical commentators but that the institution itself is regarded as the owner is apparent from the fact that a gift can be made to it *eo nomine*. The third theory is manifestly unsupportable. The ultimate beneficiaries are no doubt the persons for whose benefit the endowment is created but ownership cannot vest in an indefinite and fluctuating body of persons and according to Hindu law they are not capable of receiving the gift. It seems, therefore, that the ideas of Hindu lawyers were almost the same as we find in Roman Law, though in Hindu Law, the matter remains locked up in a few cryptic texts and was not elaborated and perfected as in the Roman system.

The other question as to who occupies the position of a trustee in the different kinds of endowment is not difficult to answer. As I have said already that trust in the technical sense did never find a place in the Hindu legal system but it was certainly recognised in its broad and general sense. Except when property is dedicated to a fraternity of monks all endowments amongst the Hindus are generally administered by the founder himself or his heirs. This is not only true of temples but also of institutions like *Dharamsalas*, *choultries*, etc. In the case of public temples it is customary to appoint *shebait*s, who hold the office from generation to generation and are remunerated for the work they do by grants of lands.

But whoever the person may be upon whom the duties of administration are vested, whether he is the *shebait* or *archaka* of a temple or the *mohunt* of a religious institution, and whether or not he is the heir of the original founder he must be deemed to occupy the position of a trustee and bound to give effect to the intention of the founder.

HERITAGE OF INDIA*

Syamaprasad Mookerjee

M.A., B.L., Barrister-at-law, M.L.A., Vice-Chancellor, Calcutta University

Let me express to your University my cordial thanks for the invitation to address your Annual Convocation. Only twenty years ago, your educational interests were linked up with the University which I have the honour to represent and numerous have been the bonds of association between your province and mine. I bring to you a message of goodwill and wholehearted co-operation from our University and province and hope in the days to come, Bengal and Bihar will work together for securing the advancement of our common interests.

You will forgive me if I do not make educational reconstruction the main theme of my discourse to-day. So much has recently been said on the subject that it may perhaps be more useful if we cease for a while from speculating on theories and concentrate on carrying out our declared policies, keeping in view the cardinal truth that India stands in need of a wide and progressive expansion of educational facilities from the lowest to the highest stage and not their curtailment in any form whatsoever.

As I stand in the historic city of Patna, the ancient Pataliputra, I feel tempted to trace some of the fundamental features of our civilisation in the majestic march of Indian history, not with the knowledge of a historian—for I lack such qualifications—but as a layman, an humble worker, who takes pride in the glories of our past history and longs for the day when this great land of ours may again claim her rightful place among the nations of the world and provide for the millions of her sons and daughters a higher and nobler life in all spheres, social, political, economic and cultural.

India has been styled an epitome of the world. This city which was the capital of the Imperial Mauryas and the Guptas, the scene of the activities of Bhadrabahu and of Sher Shah and the birthplace of Guru Gobind Singh, may well be described as an epitome of the land of Hindus and Muslims, of Jains and Sikhs. From time immemorial, it has been known for its toleration and catholicity, its love of learning and love of men. From the region where the waters of the Sone unite with the main stream of the Ganges, issued those messages of overflowing love towards men and even dumb animals which made the name of Asoka immortal. His edicts carved on rock and pillar throughout his vast empire served as a source of inspiration

*Delivered on the 27th of November, 1937, at the Annual Convocation of the Patna University.

to rulers, statesmen and philanthropists. To the city of Pataliputra flocked merchants, diplomats, savants and sages, students and enquirers from all quarters of the civilized world.

The welcome extended to the visitors from distant lands was only equalled by the solicitude shown for the material comfort of the humblest among men. The free hospitals of the metropolis were open to all, irrespective of caste or creed. Toleration and concord were the watchwords of the rulers; benevolence and righteousness inspired their subjects at large. The province that boasted of Pataliputra included within its boundaries Uruvilva and Nalanda, Uddandapur and Bikramasila, the centres of Gautama's enlightenment, of Silabhadra's discourses, of the Gopala's piety and of Dharmmapala's charity. The massive towers and fairy-like turrets of Nalanda and her sister cities were visible symbols of that solid learning, high aspiration and conspicuous talent for which those great seats of the spiritual and intellectual life of India were justly famous.

India has had a splendid past. Many were the epochs when she lay safely anchored in a haven. But at times, storm and wind battered her masts and threatened to throw her precious burthen overboard. Nature, while impressing on her the stamp of unity by encircling her with lofty mountains and rocking seas, left gaps through which successive waves of invasion swept into the interior and brought ideals and ways of life that did not always fit in with her environments. In the interior itself, the hand of nature has drawn lines by rock and wood that proved serious impediments in the way of developing a common national life. But in spite of these, our forefathers did not despair of their country and we have had brilliant epochs in the history of India when she could justly claim respectful attention from the civilised world. There were times when the political unification of the country ceased to be a mere dream of poets and patriots and came near a historical reality, resulting in an outburst of activity in the domain of religion, literature, science and art, comparable to that of the Greece of Pericles or the England of Elizabeth.

That splendour was by no means ephemeral. Indian culture has retained its vigour and vitality and has found a worthy place among the civilisations of all ages. The pyramids bear mute testimony to a vanished civilisation on the banks of the Nile, the winged bulls are but lifeless relics of another culture that once flourished on the banks of the Euphrates and the Tigris, the ruins of Persepolis and Susa are today but subjects of antiquarian interest. Greece has achieved her political independence but the old Hellenic civilisation has disappeared for good like the Medusa and the Minotaur.

Here in our land however the Hindu still chants the Vedic hymns on the banks of the sacred rivers, the Buddha, Sangha and Dhamma are still invoked by millions of devotees from the mysterious heights of Fuziyama to far-off Adam's Peak. The civilisation of India is still alive; its philosophy and teachings still inspire millions of human beings, although Indian culture no longer finds its stimulating support from an independent national state. We must attribute its success to its catholicity and universal sympathy.

The ancient Aryans did not revel in destruction for its own sake, they believed in assimilation and improvement. The Macedonian and the Greek, the Saka and the Kushan came

to conquer and slay but remained to wonder and pray. It has been often asserted that the Polytheistic Hindu failed to establish a spiritual kinship with the Monotheistic Muslim who held much that is Indian in scorn and still seeks his spiritual inspiration abroad. How can we say that India ignored the teachings of Islam when we find saints like Nanak and Chaitanya, Namdev and Tukaram, preaching the brotherhood of man and the futility of caste in matters spiritual? Although attempts on Hindu culture and institutions fill the pages of Indian history, how can we assert that Muslims ignored the appeal of Hindu culture when we find Muhammad Jayasi weaving a beautiful romance to illustrate the teachings of Hindu philosophy, when we read the simple devotional hymns of Kabir and Sheikh Farid, who refused to recognise the barriers of caste and creed on the high road to God's kingdom? "Utter not one disagreeable word," said Farid, "since the true Lord is in all men. Distress no one's heart for every heart is a precious jewel." In the same strain did Kabir proclaim, "There is the same God for the Hindu as for the Muslim." A rejuvenated India found an Akbar to put an end to political chaos and social disharmony and a Shah Jahan to dream a dream in marble the like of which is not to be met with in the world.

India did not confine her attention to her adopted children alone. Whenever the stranger stood in need of spiritual solace, she ungrudgingly gave of her best. Did not she send a prince and a princess from this very city more than two thousand years ago to the land of the Yakshas to teach them the supreme truth that the only way to happiness lies in non-violence and renunciation? Did not the Imperial ascetic send the same message to the far off lands of Egypt, Asia Minor and Greece? Did not this country spare her very best, Dipankara, when Tibet and Sumatra stood in sore need of him? That tradition is not altogether dead even now. Only the other day, Swami Viveknanda bore the message of Paramhansa Ramkrishna and of India's storied past and taught the true path to peace and happiness to a struggling materialistic world, suffering from the evils of its very greatness. And today every civilised country in the world finds in Mahatma Gandhi a new messenger of peace, an embodiment of truth and non-violence who can brave the wrath of the mightiest and suffer nobly and patiently for the sake of his ideal. Do we not find again in Sister Nivedita and Mira Ben the representatives of those pilgrims who have been coming to us all through the ages in search of the truth eternal?

It may be asked that if such has been the greatness of India as a home of culture and thought, why is it that she has lost her political independence and has become a subject nation? Would it be true to say that the catholicity and universal sympathy which contributed so much to the everlasting freshness of India's civilisation, concealed in them the germs of her political downfall? Did they engender that other worldliness which spelt ruin to the prospect of India's freedom? History supplies the answer. Did not India produce Chandragupta and Samudragupta, Pratapsingh, Sivaji, and Ranjit Singh, in spite of the pacific teachings of our ancestors? Did not the nameless but illustrious heroes the Indian Argonauts, who explored the mysteries of the uncharted seas and spread Indian culture to the furthest East, prove that Hindu pacifism did not eliminate enterprise and love of adventure? Indian sages and philosophers never suggested that cowards and weaklings would ever be the torch-bearers of India's great heritage.

नायमात्मा बलहीनेन लभ्यः—None but the valiant can achieve salvation. India's culture has not been responsible for India's bondage. That culture transplanted to the Himalayas and beyond has not taken the edge off the martial spirit of Mongolian races.

Is it then her climate that deteriorated the sturdy Aryan, Turk and Afghan in turn? If this were so, how are we to account for the rise of the Mahrattas and the Rohillas, the Jats and the Sikhs? How are we to explain the resurrection of the Rajputs? How could Hyder Ali of Mysore hold his own against the Mahrattas and the English? It is not the climate; it is not the culture; we must seek the cause of our downfall elsewhere.

India fell mainly because her people were at the critical hour divided and disorganised. Her influence waned when the forces of disintegration, political and social, were at work. If we left our neighbours alone, we revelled in internal strife which ceased for a time when great kings like Asoka and Akbar ruled over the destinies of India—mighty men, who sought to unite the teeming millions of this vast sub-continent by the bond of a common aspiration and a passionate longing for the eternal code of righteous conduct, charity and understanding. A strong and united India, fearing none and loving all, brought messages of peace and goodwill to a distracted world. But as soon as the sceptre dropped from their hands, when their grip over the country was loosened through weak and short-sighted successors, when narrow selfishness and mutual jealousy and distrust overpowered our souls, when local feuds and religious strife raised their ugly heads giving rise to social exclusiveness and moral decadence, unity was lost; freedom, man's priceless treasure, disappeared; the country broke into fragments and relapsed into a state of conflict and struggle. While the national and political unity of India was successfully achieved by great individuals, the masses did not at all times feel an abiding interest in its preservation. Thus although our culture has survived the storm and stress of time, we find ourselves in the strange and tragic position of the representatives and exponents of an ancient civilisation, yet alive but in bondage.

We may pertinently ask ourselves at this stage whether the forces of disruption that had effectively blocked the path of Indian progress in the past, have reacted more satisfactorily to present environments, social, political and economic. It is obviously not possible for me here to deal with the history of British connection with India except to make some very general observations. The English came to India as traders and ultimately remained as masters of an empire. During the last century and a half, we have witnessed the progress of India in various directions. Stability, peace and order have been generally restored. The benefits of Science, which have revolutionised civilisation and have affected the lives of men and nations to an unprecedented extent have penetrated into this great and ancient land, leading to considerable material progress. Western Education has helped to broaden our outlook, deepen the sense of patriotism and lay the foundation of a political consciousness. Ideas of liberty and equality have slowly but steadily percolated from one corner of Hindusthan to another and we witness the ever increasing vitality of Indian nationalism. A spirit of inquisitiveness has captured the minds of Indians who have proved their worth in various domains of thought and activity.

Many social evils have been uprooted and there is a general desire for uplifting the masses so that they may live more useful and noble lives.

While the progress of Indians on such lines is attributable to a large extent to western influence, no self-respecting Indian can ignore the vital defects and limitations of our national life. We must boldly take stock of the things that we have lost and yearn for. We find a general decay of the creative Indian arts which once triumphantly flourished in this land, and produced the frescos of Ajanta and the Taj of Agra. Indian music, Indian art and architecture, and Indian literature were not systematically and adequately patronised and that they have not entirely disappeared today is due mainly to the persistent efforts of individual workers. We witness the decline and disappearance of the indigenous industries of India which mainly thrived in her towns and villages. Such cottage industries, if they are to be revived, developed and saved from foreign competition require the unstinted support of the State. We find also deplorable neglect of the health and welfare of the villages of India which are today but shadows of their former affluence and happiness. Indeed much of India's poverty and distress is traced to a systematic pursuit of an economic and industrial policy which has not been prompted and administered in the sole interest of India and her inhabitants.

One of the most staggering features of Indian life of today is the illiteracy and ignorance of more than 90 per cent of the people and for this no plea or excuse will ever be accepted by any impartial historian. One other vital weakness about which Indians feel bitterly is that they have not been adequately trained to defend their own hearth and home. An autonomous India is unthinkable without a national army and a national navy controlled and manned by Indians themselves. It is not correct to assume that many of the peoples of India are devoid of military or naval traditions. Indian history gives ample evidence of individual and collective courage and heroism. If there are parts of the country where the youths have today become feeble in health and energy, surely the remedy lies not in condemning them for eternity but in training them up for competent service.

I do not forget that in recent times efforts are being made to meet some of our vital needs. But no reforms of a radical character in any field of activity will ever be possible nor can India rise to her full stature spiritually and economically until and unless she takes her rank among the free nations of the world. No material gain, no earthly possession can ever compensate for the loss of man's liberty. The conflict of ideals and interests between a subject-race and the power that wants to hold it in its leading strings is as old as history itself; it can be solved peacefully and amicably only if the latter accords to the former the same treatment as it demands from others in respect of its own rights and privileges.

In defining freedom I can do no better than follow the language of a British peer, a statesman and philosopher, who has dealt with the question with remarkable lucidity in one of his recent books. What, he asks, is the ultimate goal of enlightened man? The answer is that one of the aims is that nations should be free from alien domination. What, he asks, should be the pattern set for civilised mankind? The answer is, within the nation the individual should

be free, free to think, worship, speak and act as he would, subject to the similar rights of others, free under the protection of equal justice to pursue his lawful business as he chose. Men should no longer be bound down from birth to death by the hampering restrictions that come from bondage, poverty, overwork and environment. Freedom consists not only in the absence of restraint but also in the presence of opportunity. Liberty is not a single and simple conception. It has four elements—national, political, personal and economic. The man who is fully free is one who lives in a country which is independent; in a state which is democratic; in a society where the laws are equal and restrictions at a minimum; in an economic system in which national interests are protected and the citizen has the scope of a secure livelihood, an assured comfort and full opportunity to rise by merit.

This freedom, so truly and courageously defined, is not ours today and until this condition is reached, India will never achieve true greatness or happiness, based on the glorious features of her past civilisation.

The Indian Universities, if they are to play their role in the rebuilding of a new India, must not regard themselves as exclusive institutions which exist apart from the currents of the country's life. Let them train their alumni in a worthy manner, saturate them with the lessons of Indian history and civilisation, instil into them unity and reason, strength and dauntlessness, inspire them with skill and knowledge and teach them to apply themselves devotedly and unselfishly to the service of their fellowmen. Let the teachers of the Universities consider it their sacred duty to be the interpreters of India's heritage, the seekers of truth and knowledge, and prove to the world that Indian scholars are second to none in their efforts to serve the cause of the humanities and the sciences in relation to the unfettered progress of India and of human civilisation itself.

THE ROSENBERG CASE

D. N. Pritt, Q. C.

(Article Specially Contributed to the University Law College Magazine, Calcutta)

At present the Chief Counsel of famous Jomo Kenyatta case of Kenya and Rawalpindi Conspiracy Case of Lahore, MR. DENIS NOWELL PRITT, author of this brilliant article is one of the veteran senior members of the English Bar: Queen's (King's) Counsel since 1927. For many years a Labour M. P. and Chairman of the Howard League for Penal Reform and the Bentham Committee for Poor Litigants, he presided in September 1933, over the Reichstag Fire inquiry in London.

A review of the Rosenberg case by one of the outstanding figures in Anglo-Saxon jurisprudence will be, in our opinion, of great value to the lawyers and law students all over the country.—[Editor]

The "Rosenberg Case", as it is commonly called, was a prosecution in the Federal Courts of the United States of America of one Julius Rosenberg, his wife Ethel, and several other people, on a charge of conspiring, from June 1944 to June 1950, to obtain and communicate to the U.S.S.R. confidential information relating to the defence of the U.S.A. The information alleged to have been so obtained and communicated was alleged to relate to research work on the atom bomb.

It is interesting to note that, although the U.S. law said to have been infringed—an Act of Congress—permitted an allegation that the conspiracy was carried on "with intent to injure the U.S.A.", no such allegation was put forward, nothing more being asserted than an intent and belief that the information in question "would be used to the advantage of a foreign nation, to wit the U.S.S.R."

The trial took place in March, 1951; both Julius and Ethel Rosenberg were found guilty and sentenced to death. Nearly two and a half years later, after various appeals and motions for rehearing to appellate courts and petitions for reprieve—and after the indignant rejection by the Rosenbergs of an offer to spare the life of Ethel Rosenberg if they would confess and give information about the alleged espionage,—in respect of which they throughout protested their innocence, they were both put to death in the Sing Sing Prison at New York.

The case is of great human interest, due largely to the imposition and actual execution of a death sentence on a charge of conspiracy to do espionage not even alleged to injure the country; but the terribly long period which elapsed between the sentence and the execution, the clam nobility of the conduct, and particularly of the letters and statements of both Julius and Ethel during the two and a half years of suspense, and the grave doubts as to the fairness of the trial and the quality and nature of the evidence against them, all served to heighten the interest.

The case is of particular interest, also to lawyers and law students in India—as in Britain; for the legal system of the U.S.A. like that of India, derives from that of England, and Indian and British students alike can examine the proceedings with a great measure of technical understanding, and make the inevitable comparisons between what was done in New York in the Rosenberg case and what is done in political cases in their own countries with a pretty full knowledge of the field.

As I study the case, I find many grounds for grave disquiet. The passing and the actual carrying out of a death sentence, as I have already mentioned, are horrifying in themselves; but there is much more. Reading the case in the light of the general unstable and hysterical political atmosphere of 1951, I get more and more strongly the impression that the case was brought on weak and tainted evidence that in normal times and in a normal case would never have been allowed to come into court, and that it was brought largely for purposes of propaganda, as part of the general campaign against anything and everything that could be labelled, truly or falsely, as “communist”. At the time, the powerful interests financial and industrial, which really control American life and policy were engaged—as they still are—on a tremendous propaganda campaign, which is in reality a campaign for war against the U.S.S.R. To avoid the disastrous industrial slump, they have to develop armaments on a vast scale; to persuade the normally peaceable inhabitants of the U.S.A. to accept a belligerent policy, they have to work up a scare story of alleged Soviet aggression; and to buttress their economic and political system against the progressive elements in their country, they have to develop an hysterical campaign of calumny against all left-wing forces, grouped under the label of “Communism.” This campaign has, of course, the additional and very special advantage of helping to weaken the Trade Union forces which fight for improved economic conditions and for greater power for the huge industrial working-class.

In such circumstances, the opportunity to launch a charge of “atom-bomb espionage” against two people progressive enough to be labelled as Communists was of the greatest possible propaganda value, for the atom bomb has a special place in American hysteria; at first, it encouraged the illusion that a “Push-button war” was feasible, i.e. that the mass of the American people could stay safely at home whilst the hated and feared (and misunderstood) Socialist countries were destroyed by the latest scientific developments, operated by a few hundred airmen and their supporting forces; and later, when it was at first feared and later known that the U.S.S.R. also had atom bombs, and that in any case the best expert opinion regarded the

push-button war as impossible and heavy infantry fighting as an inevitable feature of any future war, the hysteria turned to fear.

Such a situation called for scape-goats; and a "frame-up", a false trial of the sort that has only too often poisoned justice in the U.S.A., was something which answered exactly the needs of the propagandists. That the Rosenbergs were Jews, so that a fillip could be given to anti-Semitism, somewhat easily aroused in the U.S.A., and particularly in New York, which has the largest Jewish population of all the cities, in the world, was a helpful "side-line" to the frame-up; and it was adroitly exploited by bringing the case before a Jewish Judge, and having the prosecution conducted by Jewish counsel.

The case, even apart from its more sensational or extreme features, illustrates once more the extreme difficulty of securing a fair trial when prejudices are aroused; indeed, it reminds us that when prejudices are really aroused any objective or reliable thinking on political topics becomes impossible. How can one arrive at a sensible conclusion on any matter if one begins by giving to the protagonists of one side a label—be it Communist or anything else—which in effect says: "Do not believe anything this man says. Do not indeed, examine it, weigh it, test; just assume in advance that it is wrong"?

Let me now tell you something about the case against the Rosenbergs, leaving on one side the other accused.

The Principal witness against them was a man named David Greenglass. Everyone who has studied the case, including the Appellate Courts, agrees that unless his evidence be believed and accepted, the convictions of the *Rosenbergs* could not stand. Who was he? What were his virtues or defects? What had he done in the case?

The answers to these questions are remarkably discouraging for anyone who would like to believe in the integrity and soundness of this trial. In the first place, he was himself admittedly guilty of espionage; he had established this clearly enough by not merely by a series of confessions under examination but also by pleading guilty to the charge to which the Rosenbergs had pleaded not guilty. At the time he gave evidence, he had not been sentenced; thus, as line by line—he sought in his evidence to convict the *Rosenbergs* of the crime of which he himself was in any case guilty, he might well hope, and he said in terms that he did hope, to get himself a lighter sentence as a reward for what he said. (And, in due course, when the judge came to sentence Green-glass, the lawyer pleading for a light sentence for him argued eloquently that this "approver" ought to be rewarded for betraying his alleged associates, if only because the government would never get anybody to "turn king's evidence" if they did not show such lenience).

We do not have, of course, merely to condemn Greenglass as a mean figure, who betrayed those who, he said, were his accomplices in crime; there is much more than that, from a legal point of view, to be considered when one is weighing the evidence of accomplices (or approvers). In all systems of law derived from England—probably, indeed, in all systems of law generally,—accomplices are treated as highly unreliable, not merely because they are

criminals, and in addition betrayers of their friends, but even more because it is dangerously easy for them, for one reason or another, to implicate innocent third parties in their crime by just adding perjury to their other offences. It is easy because, instead of inventing a whole story, they can tell a story which is in all its main features true, and insert in it merely one limited but serious falsity by saying that the other accused was taking part; and this despicable trick is easier than ever when—as we shall see is the case here—the relationship between the approver and the other accused is such that they would naturally, and in fact do, meet from time to time.

There may be many motives for playing this particularly easy trick; sometimes it is due to pay off a grudge—and there was some evidence in the Rosenberg case that this was so—but nearly always there is of course a very powerful motive, namely, the hope of getting a lighter sentence, or a subsequent remission of sentence, or both, in return for helping the government to convict the other accused. This motive is never stronger than when the approver is himself waiting to be, but has not yet actually been, sentenced for the crime; for, each time he is asked a critical question in examination or cross-examination, he must have it clearly before him that his chances of a light sentence will increase in exact proportion as he makes the case worse for the other accused. (In England, when accomplices are to be called as witnesses, they are given a pardon before they give evidence, so that at any rate it may not be said that they have a direct and powerful incentive to “pile it on”). Greenglass had thus every conceivable demerit from the point of view of temptation to lie for “good consideration”; he had indeed an extra motive in that his wife, whom he professed to love dearly, was named in the indictment as one of the conspirators, but not actually indicted. Greenglass, who had emphasised his own ignobility by naming her as one of the conspirators in the very first of his many interviews with the “FBI” (The Federal Bureau of Investigation), might well have had solid grounds for hoping that, by helping the government, he would help not only himself but also the wife whom he had betrayed; and certainly she has been left unscathed until today, although as it turned out, he received a heavy sentence and has not yet been released.

Practically every system of law, recognising the very poor quality of accomplice evidence, demands some form or degree of corroboration of their evidence. Of Greenglass’ evidence in this case, there was no corroboration except from his wife, who was equally an accomplice; and in my view as a lawyer, it runs counter to all normal standards of criminal procedure and of the administration of justice, to base on such evidence, in the absence of independent corroboration, not merely a conviction but a death sentence.

The defects of Greenglass as a witness on whom it would be safe to rely do not end with the above statements; the utter rottenness of the man's character is further demonstrated by the fact that Ethel Rosenberg, whom he was pushing towards the electric chair, was his own elder sister, who had always helped and befriended him. Julius *Rosemberg*, whom he was treating in the same way, was of course his brother-in-law, and the father of Ethel's two children.

The tainted evidence of Greenglass and his wife was, in substance, the whole of the

evidence against the Rosenbergs. What little else there was trivial, and what small fragment of it could have been thought to be more than trivial came from a witness who was, like Greenglass, in the conspiracy, and thus an approver. This witness admitted in the witness-box that he had told lies under oath, that he had been "scared to death" and so had told the F.B.I. "everything he knew," in the hope that he might "come out the best way", and that "nothing would happen to him." (In this he was fortunate; he was not even named in the indictment).

In answer to that weak case, both the Rosenbergs gave clear and emphatic evidence denying the story against them; and cross-examination in no way weakened them. There were one or two instances, such as a story about a console table alleged to have been given to them by the Russians, where they gave explanations at which it was easy for the prosecution, in the absence of corroboration, to poke scorn; but subsequent investigation, long after the trial established independent facts which corroborated the story.

When the evidence was finished, the jury had to arrive at their verdict in the general hysterical atmosphere of the day, additionally polluted for them by the constant efforts of the prosecution lawyers throughout the trial to drag in the alleged Communist connexions of the *Rosenbergs*. That, together with the constant mention of the "the Russians", probably sufficed to make a fair consideration by the jury virtually impossible, a fact which illustrates the difficulties which always surround political trials.

The jury duly returned verdicts of guilty on this weak evidence, and the judge, a day or two later, sentenced the *Rosenbergs* to death. As is customary in the U.S.A., he gave "reasons" for doing... and his "reasons" form one of the worst features of the case.

In the course of his reasons he delivered a lecture on "Russian terrorism". He was of course abysmally ignorant of any facts relating to the Soviet Union; if there be any Russian Terrorism; there was not any evidence of it in the case; and if an attempt had been made to introduce any such evidence, it would have been wholly immaterial and should have been excluded as such. He made similar comments on the administration of justice in the U.S.S.R.; this, too, was a sealed book to him, and equally immaterial; he would have been better employed in trying to keep clean the administration of justice in the U.S.A. All one can really gain from this part of his reasons is a still clearer picture than before of the extent to which anti-Soviet hysteria has invaded nearly all circles in America.

When he spoke of things that were really relevant to the question of what sentence ought to be passed on the *Rosenbergs* (on the assumption what they were guilty) he behaved just as badly. Although attempts by the prosecution to prove in evidence that the information obtained by Greenglass and allegedly passed on from him through the Rosenbergs to the U.S.S.R. was of real importance had broken down, so that there was no evidence of its value, the judge treated it as tremendously important. He said that it was just the vital information that enabled the U.S.S.R. to develop the atom bomb, and that country could not have developed the bomb without the information! This assertion, which has been ridiculed by many scientists ever since, seemed to form a large part of the judge's reasons for passing sentence of death;

there was no more evidence—reliable or even unreliable—to support it than there would be for the proposition that President Eisenhower built the Taj Mahal. By the side of this, the judge's statement that the conduct of the *Rosembergs* "has already caused, in my opinion, the communist aggression in Korea"—marching ill with the recent admission by one of the agents of Li Sing Man (Segngman Rhee), speaking over the television system in America, that the Korean war was in fact started by South Korea—Seems almost more silly than fatal. His further observation that the Rosenbergs had "altered the history of the world" to the injury of the U.S.A. is equally silly and equally objectionable, especially when one recalls that there was not even an allegation in the indictment of any intent to injure the U.S.A.

A sentence passed on the basis of such reasons commands, in my view, even less confidence than a verdict based on the evidence I have discussed.

And there, so far as first instance was concerned, rests this terrible injustice.

There were, of course, appeals. The American Federal procedure admits of a large number of appeals, and admits too of the various instances of appeal being approached again and again with motions for re-hearing and other methods of arguing one's points once again. But, unfortunately, none of the appellate procedure available in this case admitted of any reconsideration of the facts or the evidence, nor even of the sentence. Thus, nothing was argued through the two and a half years but points of law, some of them substantial enough but none of them successful. And so, in the end, the *Rosembergs* died—I would rather say, on my conscience as a man and a lawyer, the Rosenbergs were murdered.

**

**

**

The lesson of the case is, I think, clear. It is always difficult to try political cases justly; it is difficult to decide anything justly when the whole of the public mind has been poisoned by false stories. And, therefore, it is the duty of all of us, especially of lawyers, to keep our minds clean, to keep as free as possible from prejudice, to weigh facts and assertions soberly and carefully, to make sure where right and justice lie, and then to fight in their defence.

1955

*A grand exposition of the tests of the principle—Equality before law—guaranteed
by our constitution by the learned author.*

7

EQUALITY BEFORE LAW

Sri. M.C. Setalvad

Attorney General of India

By the Preamble of our Constitution, the people of India declare their solemn resolution to secure to all the citizens of the Indian Republic equality of status and of opportunity. To effectuate this solemn resolution the Constitution provides that the State shall not deny to any person within the territory of India equality before the law or the equal Protection of the laws.

In its struggle for social and political freedom mankind has striven continuously towards the ideal of equality for all. The urge for equality, and liberty has been the motive force of many a revolution. The Charter of the United Nations records the determination of the member nations to re-affirm their faith “in the equal rights of men and women.” Indeed, real and effective democracy cannot be achieved unless equality in all spheres is realised in a full measure.

Complete equality among men and women in all spheres of life is a distant ideal to be reached only by the march of humanity along the long and arduous path of economic, social and political progress. But the Constitution and the laws of a country can assure to its citizens a certain measure of equality.

Equality is the goal embodied in the directive principles which the Indian Constitution States to be fundamental in the governance of the country. Social and economic and political justice are to inform all institutions of the national life. Citizens, men and women, are equally to have the right to adequate means of livelihood. The material resources of the community are to be so distributed as to serve the common good and the economic system is not to result in the concentration of wealth in the hands of a few. There is to be equal for equal work for both men and women. Endeavours are to be made to secure for the citizens a uniform civil code. These facets of social and economic equality are to guide and direct legislation undertaken by the State.

The Constitution also lays down positive and obligatory rules for the enforcement of equality among persons residing in India and among the citizens of the country. The basic provision is that the State shall not deny to any person equality before the law or the equal protection of the laws. Even trained minds have found it difficult to understand and apply the

principle underlying this cryptic rule. One may, therefore, analyse it so that its meaning may be made plain.

By Article 14 the State is ordered not to deny to any person in India equality before the law or the equal protection of the laws. Who is the State? The Constitution explains the State as including the Union and State Governments, the Union and State Governments, the Union and State legislature and all local or other authorities in India. It is these bodies who are compelled to deal equally with all persons and not to discriminate between citizens. In what respect would these bodies have to observe these rules of equality?

The legislatures make laws, the local and other authorities make rules and bylaws, the Governments issue from the time to time executive orders. Such legislation, rules, bylaws and executive orders may concern the citizens generally or certain groups of citizens. Government and the other bodies may not grant privileges or impose restrictions on inhabitants of a particular, State or locality which they will deny to or not impose upon residents of another State or another locality. They may not lay down different qualifications for different persons or classes of persons in regard to obtaining employment privileges or facilities and discriminate between them. Every man or women, citizen or alien in the territory of India is entitled to ask the bodies concerned why some one like him and in the same situation has been preferred to him or given any better treatment under any law or rule or bylaw or order made by them.

The Preamble insists on equality of status. Such equality of status is attempted in part to be achieved by providing that there shall be "equality before the law" and "the equal protection of the laws." Why does the, Constitution use these two phrases? The idea underlying both is the concept of equal justice or equality of treatment. When we speak of equality before the law we visualize the law conferring a privilege or right on some individual or individuals which it has not conferred on another or others. When we speak of equal protection of the laws we think of the law being compelled to make provisions which will help or benefit or protect the rights and properties of all equally and not more of one set of persons as compared with those of another set. The law includes, we must remember, not only legislation but bylaws and rules and executive orders.

But let there be no mistake about, the meaning of these phrases. Do they mean that all men and women shall have the same rights and the same privileges irrespective of their situation or qualification or equipment? If this were so an illiterate person would be able to claim to be treated in exactly the same manner as a highly educated person and an unskilled labourer could insist upon his being paid the same emoluments as a highly qualified technician. That of course would be inequality rather than equality. What the Constitution insists upon is not absolute equality of this character but equality among people similarly circumstanced and similarly situated. As has been said by the Supreme Court of America in relation to the equal clause in the American Constitution, "equal protection of laws is a pledge of equal laws" and that means "subjection to equal laws applying alike to all in the same situation." Or, as has been said by our Supreme Court : "The guarantee against the denial of equal protection of the laws

does not mean that identically the same rules of law should be made applicable to all the persons within the territory of India in spite of differences of circumstances and conditions **there should be no discrimination between one person and another if as regards the subject matter of the legislation their position is the same.” If one may try and put it in lay language in order that two persons may claim the equal protection of the law both of them must be of equal circumstances; there should be no substantial difference between their situation. This is as it should be. For, if the law gave the same treatment to persons differing in situation or circumstances the law would really be promoting not equality but inequality.

May we understand this in a concrete manner? The population in the district of a State may consist of a large number of aborigines or may be educationally backward. Other districts of the same State may be educationally advanced. In such circumstances the State legislature may make special laws for the particular district. It may, for example, grant more funds for the promotion of education in that district and may impose lower recruitment standards for admission to services in that district. It may provide that cases may not be tried by a jury in that district though the system of jury trial may prevail in the other districts. Under such laws persons in the advanced districts will be denied certain facilities and will have certain privileges as compared to persons in the backward district. Persons in the one district as compared with the others would thus, in a sense be unequally treated by the law that this will not be an infraction of equality before the law provided in the Constitution. There is a difference in treatment but this arises out of the difference in the situation and circumstances of the inhabitants of one district as compared with those of the others. Special treatment to members of the Armed Forces in the matter of prohibition laws has been upheld. Special laws may therefore be made to suit the requirements of groups of citizens like lawyers, doctors and others. But if a law provides that certain persons in a particular area shall be tried with a jury while certain other persons similarly situated in the same area committing the same offence shall be tried without a jury the distinction will not be based on any difference in situation or circumstances. The law will offend against the rule of equality and will be unconstitutional.

Which is the authority who is to decide whether different situations or circumstances exist justifying a law according unequal treatment? The authority is a court of law. It will examine the provisions of the law and the relative situations of the individuals or the classes concerned and adjudicate whether the difference in the treatment is based on a real and substantial difference in their relative situations and circumstances.

On what principles will the courts act in determining whether a law offends against the principle of equality? One test which the courts have applied is the test of a valid classification. This test means that the court has to be satisfied that the unequal treatment is based on a rational difference in the situations and circumstances of the persons affected. But that is not the only test. The matter may also be looked at from a broad and general point of view. The court may ask itself the question whether the law charged as being an unequal law would shock

its democratic conscience or would be regarded as according unequal treatment in the broad democratic sense. These tests are necessarily vague and their application will vary from time to time with the views of the judges examining the matters. But that is inevitable; for questions whether fundamental rights have been infringed have to be determined by courts of law and the individual judgement of persons constituting the courts must influence the decision of questions of this nature.

The popular mind frequently understands the fundamental right of equality under the law as barring all discrimination in treatment between persons. Women have complained against certain service and employment being barred to them as an infringement of the guarantee of the equal protection of the laws. The answer has been that in regard to these services and employment women are differently situated from men and that the refusal to admit them is legitimate and justifiable. Government servants have complained that other less qualified have been preferred in the selection to certain offices. That again is no breach of equality for each selection has to be governed by conditions appropriate to the particular posts in respect of which such recruitment takes places.

The equality clause prevents an arbitrary discretion being vested in the executive. In the modern State the executive is armed with large powers, in the matter of enforcing bylaws rules and regulations and the performance of certain other functions. Such power may not now be exercised with discrimination. A rule or bylaw or an order capable of being used arbitrarily and so as to discriminate will be struck down by the courts as unconstitutional. The body making the law or rule or order must prescribe principles and standards which have to guide and control the executive in the exercise of its powers and discretion. For example, the issue of license regulating various trades and activities cannot be left to the unguided discretion of the licensing authority; the law or the rules made under the law under which they are issued have to lay down principles according to which the licensing authority has to act in the grant of these licenses. Even when the law itself makes no unequal provisions its administration by officers in a discriminatory manner may offend against the Constitutional rule of equality.

The equal protection clause prevents discrimination only by the State and not by individuals. Under it a person in the territory of India may complain of being unequally dealt with by a Government department; but if a private employer like the owner of a private factory discriminates in choosing his employees or treats his employees unequally the person discriminated against will have no remedy. Why this distinction between action by the State and action by an individual? Why does not the Constitution go further and prohibit all unequal treatment whether it be by the State or by a private individual?

The American Constitution, like ours, in its Fourteenth Amendment provides for the equal protection of the law. It was contended that amendment gave the American Congress power to prohibit discrimination not only by the State but by individuals as well. It was said that the substance and spirit of that amendment had been sacrificed by a subtle and ingenious but unjustified distinction between State action and individual action. Notwithstanding this

criticism the distinction has persisted in the United States and redress under the amendment is available only in respect of State legislative or administrative action. Our Constitution has taken care in Article 14 to confine its protection by express words to State action only.

There is a good reason for so restricting the operation of the "equality clause". Any extension of it to individual action may result in serious interference with the liberty of the individual. Real democracy can be achieved only by a proper balance between the freedom of the individual and fetters imposed on it in the interests of the community.

Yet even individual action in certain spheres has been restricted by our Constitution in order to enforce and promote equality. The Constitution abolishes untouchability and forbids its practice in any form. It provides that the enforcement of any disability arising out of untouchability is to be an offence under the law. Thus a private individual or the owner of a private factory discriminating against a person on the ground of his being an untouchable and imposing a disability on him will be taken notice of and punished.

The utility and scope of the equal protection clause may be explained in the words of Justice Field of the United States Supreme Court : The clause "undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their person and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediments should be interposed to the pursuits by any one except as applied to the same pursuits by others under like circumstances that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences."

ADDRESS AT THE ANNUAL LEGAL CONFERENCE

His Excellency Dr. K.N. Katju

Having spent my life in the practice of the law I naturally love the legal profession. Under the British rule it was the only profession—in a way it was the creature of that rule—which enabled Indians to show their aptitude and skill for exposition of law and jurisprudence. As Judges they won universal admiration for their judicial probity, acumen, wisdom and independence. As Advocates they won renown for the highest forensic skill, experience and fearlessness in the discharge of their duty towards the client, and in the political sphere the lawyers played a great part in laying the foundations of, and then building, the organisation which became famous throughout the world as the Indian National Congress. It is true that inspired by the philosophy of life and political strategy of Mahatma Gandhi (who was himself a lawyer of no mean repute) the Indian National Congress took to direct action, and while lawyers continued to be the builders of modern India, paradoxically they were able to do so only when they quitted the active practice of the law. To support my statement I need only mention Chittaranjan Das, Motilal Nehru, Vallabhbhai Patel and Rajagopalachari among many others. It is needless to emphasise that while they left the Bar for the sake of politics, they could not leave behind the experience and sagacity which they had gained and imbibed in the law courts. India has now become free, and I sometimes hear comments that in this changing world there is not much room left for the legal profession. There is no future before it, it is said. It is condemned as if it were a parasite on the capitalistic structure of society. In a social welfare State many people think that lawyers have no place. I do not share this opinion. I think it is mistaken, and that it is a great error to treat the legal profession as a mere adjunct to, or product of, capitalism. The function of a lawyer is not to protect or advance the cause of a man of property. His main function is to help the citizen in safe-guarding his life and liberty, and with life and liberty, of course, goes as much property as the law allows. In any political structure which is based on law, there must be an honoured place for lawyers. Indeed, Judges and Advocates must be the pillars of such a structure. Without them to keep it in proper repair and see vigilantly to its foundations, whenever so required, the edifice will soon tumble down. Of course, it is open to any people to say that they will build their political constitution not on the supremacy of the law but on the supremacy of the personal will and discretion of any particular individual or series of individuals in succession. Then it might be a different matter altogether. Then the reign of law will disappear, and the reign of discretion, arbitrary and

unfettered, will commence, but Lawyers and Advocates may even so, in such an order of society, continue to discharge useful functions.

In India, however, we have chosen to abide by the reign of law. All our parliamentary institutions are built upon it. The Constitution guarantees rights and liberties to the individual citizen, and with the well-known maxim that every citizen is presumed, no matter how ignorant and even illiterate he may be, to know the entire body of law, our system cannot work even for a single day without Lawyers, Advocates and Judges keeping the machinery going. And I go farther and say that while the Indian legal profession during the last hundred years won a great name for itself, it had no genuine opportunity for real constructive service. It had no scope to show its talents for constructive statesmanship and law-making. That opportunity has now come in this free India. The existence of freedom is the prerequisite for the exercise of this noble profession in its highest form, and I suggest to every Indian young man and woman that provided you have the aptitude for the law and you are not averse to hard work, and you resolve to observe the basic principles of righteousness and rectitude which underlie all rules of professional ethics and professional conduct, there lies, before you the brightest future imaginable. Service in Government departments or private industrial concerns and other professional and business careers leave little time for interest in politics. Only the legal profession, through its very exercise and the opportunities it offers for the widest contacts with all sections of the community, can make a citizen a good politician. I am using the word politician in its right sense as one who is interested in political welfare and in the art of self-government. It is only the lawyers who are qualified, by their knowledge and practice of the law, to become members of legislative bodies, and also with further training for Ministerships and other high offices for shouldering heavy responsibilities.

INDUSTRY AND LAW

Justice Sabyasachi Mukherji

Judge, Calcutta, High Court.

1. Traditionally the main responsibility of the business had been to earn a maximum return on the investment of the investors in the business. To-day, however, the business community is faced with a demand that they modify, alter or if necessary abandon this aim of high profits and show a serious concern for the community's welfare. This demand has many facets. The demand leads to the necessity of redefinition of the role and responsibility of private enterprise, its attitude and approach. To harmonise this new concept and role of business and business responsibility a new approach in the old capital and labour relationship is, therefore, necessary inside the industry and business.

2. Industrial legislation in India started from pre-independence days. From the Apprentices Act, 1850 to the Workmen's Compensation Act, 1923 and Trade Disputes Act, 1929 there have been series of many legislations. The Trade Disputes Act, 1929 made provisions for investigations and settlement of certain disputes. The Workmen Compensation Act, 1923 provided for compensation for workmen for injury by accident arising out of or in course of employment and was not confined to death alone. These legislations show the awareness of the legislature towards the general class of workers irrespective of particular works in which they are engaged. The advent of political independence and the framing of the Constitution of India, however, started a new chapter in this field. In this connection it is important to remember the Constitution of India. Articles 19, 23 and 24 of the Fundamental Rights and Articles 38, 39, 41 and 43 of the Directive Principles of the Constitution have far reaching ramifications and implications for industrial relation and industrial development. The recent Constitutional amendments and the decision of the Supreme Court will have important consequences in future capital labour relationship in this country. The Industrial Disputes Act, the Minimum Wages Act, the Employee's Provident Fund and Payment of Bonus Act are some of the most important legislations in the past independence era which have tremendously and radically transformed the industrial jurisprudence and outlook. The concept of sanctity of individual contracts and the old notion of master and servant relationship are gone. Industrial conspectus covers to-day question of (a) wages, with the concept of living wages, fair wages and minimum wages (b) strikes, lock outs, lay off, closure, (c) investigation, prevention, settlement conciliation and adjudication of industrial disputes, (d) control and organisation of trade unions with the special

significance to the law relating to conspiracy. The political colour of the most of trade unions and its effect on inter-union rivalries have far reaching implications for the future of our industries and their role in the national set up. The devices of Gheoras and Bundhs have their repercussions in industrial relationship from this aspect and their impact on industrial legislations both present and future requires serious study to-day. The burning problem of relationship between the employees and the companies and the industries which employ them is a problem not confined to labour law only. In a country like ours, under-developed seeking both socialism and democracy, it is unreal for our company law, it is felt by many, to ignore the workers as such as part or as members of the company. Different ideas in other countries have been advocated for larger participation by the workers in the management and in the companies. There is a theory of co-partnership which advocates that the workers and the employees acquire shares in their companies and this acquisition of shares may be given to them as part of bonus and in lieu of increased payment for salary wages. This theory has the advantage of making the workers participants in the economic units for the good of the general industry as a whole as well operating as a means of checking inflation and rising prices. This theory also advocates that the workers or the employees become not only participants in the ownership and in the profits of the industry but also by stages begin to share power in respect of the control and management of the companies. Another theory which does not advocate such radical alteration feels that industrial democracy must be towards moving by sharing of powers by means of improved machinery of collective bargaining. This would require, according to the advocates of this theory, that the management disclose more information to the representative of the workers regarding the internal position and the future prospects of a particular company or an industry.

Works councils is one of the method which has been experimented in several countries as a means of achieving better and fuller participation by the employees and workers in companies and industries. West Germany has evolved a system of introducing "Workers' Director" on the controlling boards of the companies. It is however necessary to remember that German companies have two boards namely the supervisory boards on which the worker's representatives participate and sit and the managing boards which include no such representatives but normally do have a director who is independently concerned with labour matters. These are some of the ideas that have been advocated in respect of the company law in its relation with labour and industrial legislation. I am sure that in the present climate of our country industrial democracy will have to bring about a certain amount of fusion between the company law and the labour laws. It is, therefore, necessary for one dealing with the labour laws in relation to an industry or a company to have a proper awareness and alertness about this aspect of the matter. Many of our legislations recognise that right of representation by union in litigations and proceedings under those specified statutes. Company law however as such does not so recognise as yet such right. It is a lacuna which is being felt by workers increasingly in various matters regarding the companies which go up to the Courts for adjudication and decision.

Another problem which crops up with the present labour relationship in industries and

companies is the problem connected with application of new technology and introduction of mechanisation in our industries and business. The problem is connected with the question of unemployment in a country faced as we are with the huge man power and growing unemployment, on the other hand the problem sometimes thwart the proper development and growth of new methods of techniques and improved methods of work which are also urgently necessary for under-developed country. A proper solution by proper legislation on this aspect of the relationship between the employers and employees is still awaited.

The statutory institutions in a mixed economy of our country to-day fulfil a very necessary purpose. The operation and the procedure of the statutory institution are fundamentally different from ordinary capital labour relationship. Statutory institutions are primarily not meant to be profit seeking institutions, there are meant to sub-serve the social needs of the community's welfare and to help economic development. Therefore the attitude of both the employees and the Managers of the statutory institutions must be permitted by different outlook. But these institutions also have come within the ambit of the general labour laws and these must ensure that their workings are such which do benefit the community at large.

One must look upon the problems of labour relationship in its various and manifold aspects with the awareness of the country and the time in which one is living and working. Then only one will be able to appreciate intelligently the present and also to anticipate the future. It is however important to remember that all these relationships deal with men and unless we are permitted by a desire of fellow feeling and service and welfare of humanity no amount of technical knowledge of any aspect of law would make one a good manager or corporator or an executive either in the private sector or in the statutory corporations. We neglect planning for men to our peril. It is important therefore to member that behind all schemes and all institutions and all laws are human beings and if we have dedicated, honest and capable men doing their duties in their respective spheres with a sense of participation then only can institutions function better and laws operate effectively.

Law and jurisprudence are slowly and often unconsciously shifting their emphasis from technicalities and abstract rules to practical justice and we must begin to recognise human beings as the most distinct and important feature of the Universe which confronts our senses and we must recognise the function of laws and the social institutions as the historic means of guaranteeing preeminence of Man as Man. We need new technology. Many are on the edge of starvation despite to-day's science and technology. These pressing human problems must be faced. The problem of law in relation to business and industry is how to advance science and technology, how to apply these with understanding and attention to the human consequences. It is well to remember that in the immediate future there will less security than in the immediate past, less stability. But on the whole, great ages have been unstable ages. We can only hope to meet the challenge with knowledge, with courage and wisdom.

Based on a lanugural Speech of the Executive Development Programme of the Indian Institute of Management, Calcutta.

ARTICLE 31C—AN OUTRAGE ON THE CONSTITUTION

N. A. Palkhivala

Barrister-at-Law, Supreme Court.

"The people never give up their liberties but under some delusion.

The true danger is, when liberty is nibbled away, for expedients, and by parts."

EDMUND BURKE

Article 13(2) of the Constitution provides that the State shall not make any law which takes away or abridges the fundamental rights. The word "law" in that Article was construed by the Supreme Court in *Golaknath's* case¹ as including constitutional amendments; and it was held in that case that Parliament could not abridge or take away the fundamental rights in exercise of its power under Article 368 to amend the Constitution.

The Twenty-fourth and Twenty-fifth Amendments

The Twenty-fourth Amendment sought to supersede that judgment by enacting that Article 13(2) shall not apply to constitutional amendments. It aimed at empowering Parliament to take away or abridge all or any of the fundamental rights and to confer generally on Parliament an unfettered power to alter the whole or any part of the Constitution.

On 5 November, 1971 the President of India gave his assent to the Twenty-fourth Amendment. The cure for the illusion that Parliament would exercise its newly conferred power with restraint and circumspection is to look at the Twenty-fifth Amendment which came into force on 20 April, 1972.

The Twenty-fifth Amendment contained three significant provisions.

First, it amended Article 31(2) and provided that anyone's property may be acquired on payment of an "amount" instead of "compensation". The intention was that the citizen's right to property should be transformed into the State's right to confiscation and the State should be able to deprive anyone of any property in return for any amount payable at any time on any terms; and the executive action, however arbitrary or irrational, should not be subjected to the Court's scrutiny. Such State action may have a direct impact on any of the other fundamental rights, the exercise of which would be impeded or negated by the deprivation of property without compensation, the only exception being the case of educational institutions dealt with in the proviso to Article 31(2). Publishers may be deprived of their printing presses -

and buildings, trade unions of their properties, professional men of their professional assets, all without compensation, and thus the fundamental rights to freedom of speech, to form unions, and to practise any profession,—guaranteed by Article 19(1)(a), (c) and (g)—can be eroded or extinguished. The amended Article 31 has nothing to do with concentration of wealth, and permits any common citizen's property, however small in value, to be acquired by the state without the payment of what would be compensation in the eye of the law.

Secondly, the Supreme Court had held in the *Bank Nationalisation* case² that the power of acquisition or requisition envisaged by Article 31(2) was subject to the citizen's right to acquire, hold and dispose of property under Article 19(1)(f) which, in its turn, was subject under Article 19(5) to reasonable restrictions in the interests of the general public. The Twenty-fifth Amendment enacts that Article 19(1)(f) would be inapplicable to acquisition or requisition laws. Since all reasonable restrictions in the public interest are already permitted under Article 19(5), the only object of making Article 19(1)(f) inapplicable would be to enable acquisition and requisition laws to contain restrictions and procedural provisions which are unreasonable or not in the public interest. It is impossible to perceive the social content of a law which is not reasonable or not in the public interest. After the Twenty-fifth Amendment, any law for requisitioning or acquiring property may be passed with an express provision which violates the rules of natural justice. The Land Acquisition Act can be amended to provide expressly that any man's land or house can be acquired without any notice to the owner to show cause against the acquisition or to prove what "amount" should be paid to him for the property acquired. In fact, many industrial undertakings have been nationalised overnight by Ordinances which fixed, without any notice to anyone, ridiculous amounts payable by the State.

Thirdly, the Twenty-fifth Amendment inserted Article 31C which provides that "no law giving effect to the policy of the State towards securing the principles specified in clause (b) or clause (c) of article 39 shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14, article 19 or article 31; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy".

The directive principles of State policy set out in Article 39(b) and (c) deal with the entire economic system, and, therefore, countless categories of law can claim the protection of Article 31C since most laws can be related to the economic system in one way or another.

Subversion of seven essential features of the Constitution

Article 31C seeks to subvert seven essential features of the Constitution.

First, there is a fine but vital distinction between two cases of constitutional amendment :

- (a) where the fundamental rights are amended to permit laws to be validly passed which would have been void before the amendments; and
- (b) where the fundamental rights remain unamended but the laws which are void as offending those rights are validated by a legal fiction that they shall not be deemed to be void.

The question is not one merely of legislative device. In the first case the law is constitutional in reality, because the fundamental rights themselves stand abridged. In the second case the law is unconstitutional in reality but is deemed by a fiction of law not to be so; with the result that the Constitution-breaking law is validated and there is a repudiation of the Constitution *pro tanto*.

If the second case is permissible as a proper exercise of the amending power, the Constitution could be reduced to a scrap of paper. If Article 31C is valid, it would be equally permissible to Parliament so to amend the Constitution as to declare all laws to be valid which are passed by Parliament or State legislatures in excess of their legislative competence, or which violate any of the basic human rights in Part III or the freedom of inter-State trade in Article 301. It would be equally permissible to have an omnibus Article that “notwithstanding anything contained in the Constitution, no law passed by Parliament or any State legislature shall be deemed to be void on any ground whatsoever”. The insertion of only one such Article would toll the deathknell of the Constitution. (The fact that under the Supreme Court’s judgment in the Fundamental Rights case³ the Constitution cannot be so amended as to alter its basic structure, is not relevant to the point considered here, viz. that a quietus is given to the supremacy of the Constitution by the omnibus protection of Constitution-breaking laws.)

Thus Article 31C clearly damages or destroys the supremacy of the Constitution which is one of the essential features. It gives a blank charter to Parliament and all the State legislatures to defy and ignore the constitutional mandate regarding human rights.

Secondly, Article 31C subordinates the fundamental rights to the directive principles of State policy and in effect abrogates the rights as regards laws which the legislature intends or declares to be for giving effects to the directive principles. The fundamental rights are paramount and are enforceable in the court (Articles 32 and 226), in contrast to the directive principles which are not so enforceable (Article 37). To abrogate the fundamental rights when giving effect to the directive principles is to destroy another basic element of the Constitution. Ignorance and arbitrariness, injustice and unfairness, would hereafter not be open to challenge on the touch-stone of the invaluable basic rights.

Thirdly, it is a fundamental principle of the Constitution that it can be amended only in the “form and manner” laid down in Article 368 and according to that Article’s basic scheme⁴. This principle is sought to be repudiated by Article 31 C. That Article has the effect of virtually authorising abrogation of the fundamental rights while they still remain ostensibly on the statute book. Criticism and debate, within and outside Parliament, which would be evoked by a proposal to abridge a particular fundamental right are avoided, while various fundamental rights are effectively silenced. The absurd situation is that, whereas an amendment of a single fundamental right would require a two-thirds majority (Article 368), a law falling within Article 31C which overrides and violates several fundamental rights can be passed by a simple majority.

Fourthly, the fundamental rights constitute an essential feature of the Constitution. Within its field Article 31 C completely takes away the right to acquire, hold and dispose of property

(Article 19(1)(f)), the right not to be deprived of property save by authority of law (Article 31(1)), the right to assert that property can be acquired or requisitioned by the State only for a public purpose (Article 31 (2)), and the right to receive an “amount”, however small, when the State seizes the property (Article 31(2)).

In short, Article 31 C expressly authorises outright confiscation of any property, large or small, belonging to anyone, poor or rich, citizen or non-citizen.

Further, Article 31 C provides for the wholesale smothering of various rights which are altogether distinct from the right to property and are totally irrelevant to the directive principles laid down in Article 39(b) and (c). Even the rights

- to equality before the law,
- to freedom of speech and expression;
- to assemble peaceably and without arms, to form associations or unions,
- to move freely throughout the territory of India,
- to reside and settle in any part of the territory of India, and
- to practise any profession or to carry on any occupation, trade or business,

which are so vital for the survival of democracy, the rule of law, and the integrity and unity of the republic, can be violated under Article 31C under the cloak of improving “the economic system”.

Fifthly, a citizen is not even permitted to raise the question whether the proposed law will result, or is reasonably calculated to result, in securing the directive principle laid down in Article 39(b) or (c). The wrong done to the people who are deprived of their basic freedoms is worsened by protection even to laws which may not be at all calculated to give effect to the directive principle⁵.

The right to move the Supreme Court for the enforcement of the other fundamental rights is itself a fundamental right (Article 32) and is a basic feature of the Constitution. This right is destroyed when the fundamental rights are made unenforceable against a law purporting to give effect to the directive principles and at the same time the court is precluded from considering whether the law is such that it can possibly secure any directive principle.⁵

Sixthly, a basic principle of the Constitution is that no State legislature can amend the fundamental rights or any other part of the Constitution. This essential feature is repudiated by Article 31 C which empowers even State legislatures to pass laws which virtually involve a repeal of the fundamental rights. The wholly irrational consequence is that whereas State legislatures cannot abridge a single fundamental right, it is now open to them to supersede a whole series of such rights. In substance, the power of amending or overriding the Constitution is delegated to all the State legislatures,—which is not permissible under Article 368.⁶ Hereafter liberty may survive in some States and not in others, depending on the complexion of the political party in power. The State of Meghalaya has already passed a law prohibiting residents of other parts of India from staying in Meghalaya for more than six months without a permit.

Seventhly, one of the essential features of the Constitution is the provision for due protection to minorities and their cultural and educational rights. The fundamental rights under Articles 14, 19 and 31 which are sought to be superseded by Article 31C are necessary to make meaningful the specific rights of the minorities which are guaranteed by Articles 25 to 30. Under the guise of giving effect to the directive principles, a number of steps can be taken which may seriously undermine the position of regional, linguistic, cultural and other minorities.

The proviso inserted by the Twenty-fifth Amendment to Article 31(2) is very tell-tale. It expressly provides that where the property of an educational institution established and administered by a minority is acquired, the amount fixed for the acquisition should be such as not to restrict or abrogate the right guaranteed under Article 30(1). The clear implication is that when property is acquired in other cases, an amount can be fixed which restricts or abrogates any of the other fundamental rights,—for instance, the right to freedom of speech and expression Article 19(1) (a), to form associations or unions Article 19(1)(c), or to practise any profession or carry on any occupation, trade or business Article 19(1)(g), or the right of a religious community to establish and maintain institutions for religious or charitable purposes (Article 26). Further, if a law violates the rights of the minorities under Articles 25 to 30, such a law, being invalid, would be no law at all and therefore deprivation of property under such a law would violate Article 31(1) which provides that no person shall be deprived of his property save by authority of law, *i.e.* a valid law. But since Article 31(1) is one of the Articles abrogated by Article 31C, minorities can be deprived of their properties held privately or upon public charitable or religious trust, by a law which is invalid.

In sum, Article 31C is a monstrous outrage on the Constitution.

In the entire history of liberty, never were so many hundreds of millions deprived of so many fundamental rights at one fell swoop as by the insertion of Article 31C. De Tocqueville remarked that nothing is more arduous than the apprenticeship of liberty. It is a measure of our immaturity as a democracy and the utter apathy of our people that the betrayal of our basic freedoms excited hardly any public debate.

The four attributes of a totalitarian State are : constitutional permission to the ruling party to favour its own members denial of the right to dissent or to oppose; denial of various personal freedoms; and the State's right to confiscate anyone's property. All these four attributes of a totalitarian State are implicit in Article 31C. This Article has a built-in mechanism for the dissolution of the true democracy that India has been so far, cessation of the rule of law and possible disintegration of the nation.

The Government's argument was that, though the power of amending the Constitution must be held to be limitless after the Twenty-fourth Amendment and it can destroy human freedoms under Article 31C, the legislature will not use the power. The answer to this is contained in the words of W.B. Yeats : "No Government has the right, whether to flatter fanatics or in mere vagueness of mind, to forge an instrument of tyranny and say that it will never be used."

Moreover, laws characterised by strident injustice have in fact been passed in pursuance of the amended Article 31(2) and the new Article 31C. General insurance companies have been nationalised under a law which provided for fixed amounts” payable on the acquisition of all their assets and liabilities, the amounts having been fixed on a basis which was not officially disclosed either to Parliament or to the public but which transpired to be positively absurd. Some companies found that the amounts they received were less than the value of their government securities and the amounts of their currency notes and bank balances after providing for all liabilities; in other words, there was a blatant repudiation of the National Debt. One insurance company was paid Rs. 10,000 for acquisition of its net assets worth more than Rs. 23,00,000. Laws for nationalisation of coal mines have also been passed, under which all assets of the nationalised companies are taken over but none of their liabilities; and further, all the creditors of the companies are statutorily deprived of every charge or security which had been created on the companies’ assets. The net result is that banks which had advanced moneys to the companies have lost their principal, interest and security; debenture-holders have lost their entire capital; ex-employees of the companies who retired before nationalisation have lost their right to pension and other dues; and traders have lost the price of goods which had been given on credit. Thus innumerable innocent citizens have found their property virtually confiscated outright as a side effect of the law expropriating the colliery companies. Those companies cannot discharge their liabilities because all their assets are gone and even the derisory “amounts” due to them on nationalisation are to be paid to the Commissioner of Claims who is not appointed for years. Similar nationalisation laws have been passed for confiscation of all the assets of “sick” textile mills, without taking over any of the liabilities, coupled with statutory abrogation of all mortgages and other securities in favour of creditors, with the same disastrous consequences for innocent third parties.

Article 31C has damaged the very heart of the Constitution. This poisonous weed has been planted.

“Where it will trouble us a thousand years, Each age will have to reconsider it.”

Reference :

1. Golaknath v. State of Punjab [1967] 2 S.C.R. 762, A.I.R. 1967 S.C. 1643, overruled by Kesavananda v. State of Kerala A.I.R. 1973 S.C. 1461.
 2. R.C. Cooper v. Union of India [1970] 3 S.C.R. 530, 576-77, A.I.R. 1970 S.C. 564, 596-97.
 3. Kesavananda v. State of Kerala A.I.R. 1973 S.C. 1461.
 4. Cf. Attorney-General for New South Wales v. Trethowan 1932 A.C. 526.
 5. In Kesavananda v. State of Kerala A.I.R. 1973 S.C. 1461 the Supreme Court held this provision barring the Court’s jurisdiction to be void.
 6. Cf. In re The Initiative and Referendum Act 1919 A.C. 935, 945 (P.C.); Shama Rao v. Union Territory of Pondicherry [1967] 2 S.C.R. 650, 653-54, 659-60, A.I.R. 1967 S.C. 1480, 1484, 1487; Attorney-General of Nova Scotia v. Attorney-General of Canada 1951 C.L.R., S.C. 31, 37-38.
-

SHAKESPEARE AND LAW

The Hon'ble Mr. Justice P. B. Mukharji

(Judge, High Court, Calcutta)

The works of Shakespeare are amongst the most glorious and priceless heritages of the English nation. So is the English legal system of justice. Curiously enough the former abounds in critical references to the latter. Indeed Shakespeare's constant and confident use of dry legal terms, that acquired new horizons of felicity and expressiveness in the hands of that great master of minds and men, evokes our admiration and wonder. Here Hon'ble Mr. Justice Mookherjee, illustrates with his great scholarship in Shakespearean literature, the innumerable references to law and legal terms in Shakespeare's writings and the intimacy that Shakespeare had with Law and its ways [Editor]

It is a stimulating paradox of life that England's greatest poet and dramatist should have chosen to be the most uncompromising critic of England's greatest blessing and possession, the English Law and the English legal system of justice. Shakespeare's legal knowledge appears from his constant and confident use of legal terms and their frequent recurrence in every play, in almost all the poems and even in the Dedications that he made. Our wonder at this use of legal expressions is not so much that Shakespeare understood them so well as in the fact that the man who commanded the most versatile vocabulary that any English writer has ever been able to wield, should have used them with such persistence. He did not need them as instruments of expression because his resources in the treasures of words were too vast for such an appeal. The legal terms acquired new horizons of expression in the hands of this great master of words and thoughts and thus manifested new potentialities which till then were untapped. They came from the mouth of almost every person and every dramatic character that he had created, from the Queen, from the child, from the Merry Wives of Windsor, from the Egyptian fervour of Cleopatra, from the love sick Paphian Goddess, from violated Lucrece, from Lear, from Hamlet, from Othello. They appear in Shakespeare's soliloquies, in his Sonnets, from Falstaff, and from melancholy Jaques. He utters them at all times and on all occasions. The drama of human emotions and ambitions found the terms of law an expressive vehicle. These emblems of his industry are woven into his style like brilliant decorations in the purpled robe of law. All this has led to the speculation that Shakespeare must have studied in an Attorney's office. But that will remain always a conjecture. Shakespeare is the great exemplar who showed that law and literature could combine to fashion the most moving and impressive expressions

There is evidence, both intrinsic and extrinsic, that Shakespeare had little love for Law and Lawyers. It is not unlikely that his contacts with law have been such as to give him the bitter taste. From 1578 when William Shakespeare was 14 years of age, his father's fortune declined to such an extent that his properties had to be sold or mortgaged. He was involved in costly litigation and even imprisoned for debt. In 1586 when a distress was issued upon his goods, it was discovered that there were, in fact, no goods upon which to distrain. It is said that the great poet himself was prosecuted, in law, by Sir Thomas Lucy for a poaching adventure in Charlecote Park, Worcestershire. According to some biographers, this led to his leaving the native country for some time. Such experience as this was not likely to incline the poet to develop an appreciation of the great legal system which England has given to the world.

In King Henry VI, Shakespeare declares, "The first thing we do, let us kill all the lawyers." This was a very favourite theme of the great poet. When, through the mouth of Hamlet, he catalogues the ills "That flesh is heir to", he is not slow to mention "the law's delay" which expression since then has become proverbial and a most convenient stick in the hands of subsequent critics of later generations to beat the law with. Such bitterness appears again in Hamlet in the famous Churchyard Scene where the lawyer's skull is the celebrated graveyard attraction. Here are Shakespeare's own words:—

"Why may not that be the skull of a lawyer? Where be his quiddities now, his quillets, his cases, his tenures, and his tricks? Why does he suffer this rude knave now to knock him about the scene with a dirty shovel, and will not tell him of his action of battery? This fellow might be in's time a great buyer of land, with his statutes, his recognizances, his fines, his double vouchers, his recoveries; in this the fine of his fines, and the recovery of his recoveries, to have his fine pate full of fine dirt? Will his vouchers vouch him no more of his purchases, and double ones too, than the length and breadth of a pair of indentures? The very conveyances of his lands will hardly lie in this box; and must the inheritor himself have no more?"

That is how Shakespeare hammers the last nail on the coffin of the lawyer.

Nor was Shakespeare slow in his ridicule, and in the mastery of his art, his ridicule was sharp. In King Henry IV, he describes "Shallow and Silence, the decrepit Country Justices exchanging reminiscences of their legal education and selecting recruits for Falstaff's draft". In the Merry Wives of Windsor, he tells you "a Squire in the County of Gloucester, Justice of the Peace and Coram" behaving in a manner unworthy of the dignity of the Bench.

In 'As You Like It', you get the Shakespearean picture of a Judge in these famous and inimitable words:—

"And then the justice,
In fair round belly with good capon lin'd,
With eyes severe and beard of formal cut,
Full of wise saws and modern instances,
And so he plays his part."

That was how England's great poet and dramatist drew the image of dignity, repository of learning, the fountain of justice. That is very nearly the picture of John Bull which you see in the Punch. In Henry V, he also has a dig at the lazy Judge in these words:—

"The sad-ey'd justice, with his surly hum,
Delivering o'er to executors pale
The lazy yawning drone."

King Lear has some of the bitterest passages against Law, Lawyers, and Justice. Listen to what Shakespeare says in King Lear on the escape of Generil during her trial :—

"*Lear*: I shall be done: I will arraign them straight. Come, sit thou here, most learned justicer:—(To Edgar)

Thou, sapient sir, sit here (To the Fool)—Now, you she-foxes!

Edg: Look, where he stands and glares.

Wantest thou eyes at trial, madam?

Lear: I'll see their trial first.—Bring in the evidence.—

Thou robed man of justice, take thy place,—(To Edgar)

And thou, his yoke fellow of equity, (To the Fool)

Bench by his side:—you are o'the commission

Sit you too.

Edg: Let us deal justly.

Lear: Arraign her first: 'tis Generil. I here take my oath before this honourable assembly, she kicked the poor king her father.

Fool: Come hither, mistress. Is your name Generil?

Lear:—She cannot deny it.

Fool: Cry you mercy, I took you for a joint-stool.

Lear: And here's another, whose warp'd looks proclaim.

What store her heart is made on.—Stop her there!

Arms, arms, sword, fire!—Corruption in the place!—

False justicer, why hast thou let her 'scape?'

In the King Henry VI, Shakespeare is eloquent. Cado's announcement of his intention to reform the laws by killing the lawyers, and to make it felony to drink small bear; his discourse on the destructive effect of parchment, wax, and seals; the charge against the clerk of Chatham that he can make obligations and write court-hand; the order to pull down the inns of court; the command to burn all the records of the realm; the fear of biting statutes—are the highlights of this scene in the great drama. So when Lord Say is brought before him, Cado's language is judicial, and he asserts his "jurisdiction regal." Say has "traitorously" erected a grammar school, and his use of the word is not only correct, but indispensable because the strict law

is that treason must be laid to have been committed traitorously, this word being indispensably necessary. It seems to suggest that Shakespeare not only knew the legal vocabulary but also the law itself. I will give you here Cado's own words which Shakespeare uses:—

Cado:—The three-hooped pot shall have ten hoops and I will make it felony, to drink small bear: all the realm shall be in comon, and in Cheapside shall my palfry go to grass.

Dick: The first thing we do, let's kill the lawyers.

Cado: Nay, that I mean to do as not this a lamentable thing, that of the skin of an innocent lamb should be made parchment? That parchment, being scribbled o'er, should undo a man? Some say the bee stings: but I say 'tis the bee's wax, for I did but seal once to a thing, and I was never mine own man since. How now? Who's there?

Smith: The clerk of Chatham: he can write and read.

Cado: O monstrous!

Smith: We took him setting of boys' copies.

Cado: Here's a villain!

Smith: He's as a book in his pocket, with red letters in't.

Cado: Nay, then he is a conjuror.

Dick: Nay, he can make obligations, and write court-hand.

Cado: So, sirs: Now go some and pull down the Savoy, others to the inns of court; down with them all.

Dick: I have a suit unto your lordship.

Cado: Be it a lordship, thou shalt have it for that word.

Dick: Only that the laws of England may come out of your mouth.

John: Mass, 't will be sore law then; for he was thrust in the mouth with a spear, and 'tis not whole yet.

Smith: Nay, John, it will be stanking law, for his breath stinks with eating toasted cheese.

Cado: I have thought upon, it, it shall be so. Away, burn all the records of the realm, my mouth shall be the Parliament of England.

John: Then we are like to have biting statutes, unless his teeth be pulled out."

Coleridge once said, "A young author's first work almost always bespeaks his recent pursuits." He could have said with no less appropriateness that no author can really hide his pursuits. It is difficult for any author to escape the stamp of his associations in life, and they are consciously or unconsciously betrayed by his style, his theme, his prejudices, his sympathies, and his antipathies. Shakespeare, the great master of English literature, could not escape that fate. Sir Walter Scott was called to the Bar and his chivalrous novels testify his legal proficiency. Fielding could not completely shed his experience as a Magistrate in his writings and it appears in his examination of Patridge, in the conspiracy between Lady Booby and Lawyer Scout against

Fanny. More direct is the evidence you find in Donne's writings. Donne was a student at Lincoln's Inn, and even while describing the courtship of a Barrister he uses the most felicitous language to show how law can join hands with romance. To give an example, these are his lines:—

—“he throws,
Like nets or lime twigs, wheresoe'r he goes,
His title of barrister on every wench,
And woos in language of the pleas and bench.
A motion, lady! Speak, Cosus. I have been
In love o'er since tricesime the queen.
Continual claims I've made, injunctions get
To stay my rival's suit, that he should
Not proceed; spare me, in Hilary term I went;
You said if I returned next 'size in Lent,
I should be in remitter of your grace.
In th' interim my letters should take place of affidavits.”

Shakespeare ridicules the law on many points. His ridicule of the law against suicide and the denial of a Christian burial to a suicide and his pungent remarks on the law of inquest appear in a well-known passage in *Hamlet*. The words of his Clowns are:—

“First Clown: Give me leave. Here lies the water; good; here stands the man: good; if the man go to this water, and drown himself, it is, will he, nill he, he goes,—mark you that; but if the water come to him and drown him, he drowns not himself: argal, he that is not guilty of his own death, shortens not his own life.

Sec. Clown: But is this law?

First Clown: Ay, marry, is't; crow ner's quest law.”

Shakespeare's judgment on circumstantial evidence and its value is illuminating. With great legal craft, this master of language and imagination eloquently points to the simulation of evidence which fabricators create by perverting or inventing circumstances and exposes the unreliability of such evidence as in the incident of exhibition of Joseph's coat to Jacob, the existence of the mole on Imogen's snow-pure breast, in Lady Macbeth's frantic efforts to smear the grooms' faces with blood and in Iago's use of the handkerchief. It appears that Shakespeare pricked the bubble of the judicial doctrine that circumstances cannot lie and his purpose is to show that circumstances themselves can be invented, framed and devised in diverse ways by the endless villainy of human nature and thus misguide and defeat truth and justice.

Shakespeare always portrays the legal atmosphere with consummate skill. The most famous scene on this point occurs in his *Merchant of Venice* in the trial of Shylock by Portia. The fidelity shown in representing the proceedings in a Court of Justice is almost perfect. With

exemplary exactitude, this great dramatist brings out the perpetual conflict between legal justice and mercy and the ability of law always to find sufficient casuistry to defeat obvious injustice which is the recurrent danger in a mechanical application of law. Shylock demands payment "according to the tenor" of his bond, and "tenor" is a legal term in the context. The Judge is bound by his oath to apply the law. But then true justice can always discover that there will be no blood, if a pound of flesh only is the legal exaction of the bond. It is thus how justice does the legal act, avoids the dilemma between justice and sentiment by finding legal reason to temper justice with mercy. Here are some of the words of this famous scene the words of this famous scene:—

Por. A pound of that same merchant's flesh is thine:
The Court awards it, and the law doth give it.

Shy. Most rightful judge!

Por. And you must cut this flesh from off his breast.
The law allows it, and the court awards it.

Shy. Most learned judge:—A sentence; come, prepare.

por. Tarry a little:—there is something else.

This bond doth give thee here no jot of blood:

The words expressly are a pound of flesh.

Take then thy bond, take thou thy pound of flesh;

But, in the cutting it, if thou does shed

One drop of Christian blood, thy land and goods

Are, by the laws of Venice, confiscate

Unto the state of Venice.

Gra. O upright judge!—Mark, Jewy—O learned judge.

Shy. Is that the law?

Por. Thyself shall see the act,

For, as thou urgest justice, be assur'd

Thou shalt have justice more than thou desir'st."

When Portia's appeal to Shylock for the quality of mercy went in vain, law followed its inexorable course. Incidentally this shows Shakespeare's full grasp of one of the fundamental principles of interpretation: to follow the express language where there is no ambiguity.

Shakespeare was not slow to pronounce on the judicial functions of Courts acting as guardians of infants. He satirised that branch of the Law in King John in these words:—

"*K. John.* From whom has thou this great commission,
To draw my answer from the articles?

"*K. Phi.* From that supernal judge, that stirs good thoughts
In any breast of strong authority,

To look into the blots and stains or right.
That judge hath made me guardian to this boy.
Under whose warrant, I impeach thy wrong,
And by whose help I mean to chastise it.

"K. John: Alack, thou dost usurp authority.

"K. Phi: Excuse, it is to beat usurping down.

Shakespeare's criticism of "strict statutes and biting laws" is as merciless as could be. In *Measure for Measure*, Shakespeare uses his master vocabulary upon this subject, and his words are:—

"We have strict statutes, and most biting laws,
The needful bits and curbs to headstrong steeds,
Which for these fourteen years we have let sleep,
Even like an o'ergrown lion in a cave.
That goes not out to prey. Now, as fond fathers
Having bound up the threatening twigs of birch,
Only to stick it in their children's sight,
For terror, not to use, in time the rod
Becomes more mock'd than fear'd; so our decrees,
Dead to infliction, to themselves are dead;
And liberty plucks justice by the nose;
The baby beats the nurse, and quite athwart
Goes all decorum."

The system of trial by Jury which is regarded as one of the basic guarantees of freedom in Anglo-Saxon countries provoked as much controversy during the days of Shakespeare as it does now. Shakespeare gave vent to this feeling on trial by Jury in these words in *Measure for Measure*:—

"The jury, passing on the prisoner's life,
May, in the sworn twelve, have a thief or two
Guiltier than him they try. What's open made to justice,
That justice seizes : what know the laws,
That thieves do pas on thieves?"

Shakespeare's intimacy with Law, Lawyers, and the legal atmosphere of his country was far too great to completely obliterate at least some appreciation of the independence of Judges in the English legal system. Henry Wriothesly to whom Shakespeare dedicated "the first heir of his invention" was the grandson of a commonlaw lawyer, who was Lord Chancellor from 1544 to 1547. The Inns of Court of that time were the scenes of lively dramas of great attraction

where one could see the relationship between the most dramatic profession of real life and that which mimics life on the stage. The social history of England at that time contains indication that law and drama had not then separated so much as they have done now, and it is not unlikely that Shakespeare participated in the dramatic performances frequently staged then under the auspices of the Inns of Court. The pride of the English legal system is the independence of the Judiciary which rejected alike the favours of the executive and the acclamation of the people. One of the most moving passages in Shakespeare in appreciation of the Judges' independence appears in Henry IV in the following dialogue between the King and the Chief Justice, between Henry V lately becoming King and the Chief Justice who had formerly committed him for contempt:—

“King: You all look strangely on me: and you most; (To the Chief Justice) You are, I think, assur’d I love you not.

“Ch. Justice: I am assure’d if I be measur’d rightly,
Your majesty hath no just cause to hate me.

“King: No!

How might a prince of my great hopes forget
So great indignities you laid upon me?
What! rate, rebuke, and roughly send to prison,
The immediate heir of England! Was this easy?
May this be wash’d in Lethe, and forgotten?

Ch. Just. I then did use the person of your father
The image of his power lay then in me;
And in the administration of his law,
Whiles I was busy for the commonwealth,
Your highness pleased to forget my place,
The majesty and power of law and justice,
The image of the king whom I presented,
And struck me in my very seat of judgment,
Whereon, as an offender to your father,
I gave bold way to my authority,
And did commit you. If the deed were ill.
Be you contented, wearing now the garland,
To have a son set your decrees at nought;
To pluck down justice from your awful bench,
To trip the course of law, and blunt the sword
That guards the peace and safety of your person.

Nay, more, to spurn at your most royal image,
And mock your workings in a second body.
Question your royal thoughts, make the case yours:
Be now the father and propose a son:
Hear your own dignity so much profan'd,
See your most dreadful laws so loosely slighted.
Behold yourself so by a son disdain'd,
And then imagine me taking your part,
And in your power, soft silencing your son:
After this cold considerance, sentence me,
And as you are a king, speak in your state,
What I have done that misbecame my place.
My person, or my, liege's sovereignty.

King: You are right, justice, and you weigh this well.
Therefore, still bear the balance and the sword:
And I do wish your honours may increase,
Till you do live to see a son of mine,
Offend you, and obey you, as I did.
So shall I live to speak my father's words,
"Happy am I, that have a man so bold,
That dares do justice on my proper son;
And not less happy, having such a son,
That would deliver up his greatness so,
Into the hands of justice." You did commit me:
For which, I do commit into your hand
The unstained sword that you have us'd to bear;
With this remembrance,—that you use the same
With the like bold, just, and impartial spirit.
As you have done 'gainst me."

Apart from his famous dramas, Shakespeare's Sonnets also reveal the same preference for legal terms. I can give you one instance where he makes the most liberal use of legal terms all over his Sonnet, which he as a master draftsman could easily have avoided. See an example:—

"So now I have confess'd that he is thine,
And myself am mortgag'd to thy will;

Myself I'll forfeit, so that other mine
Thou wilt restore, to be my comfort still;
But thou wilt not, nor he will not be free,
For thou art covetous, and he is kind;
He learn'd but, surety-like, to write for me,
Under that bond that him as fast doth bind.
The statute of thy beauty thou wilt take.
Thou usurer, that put'st forth all to use,
And sue a friend, came debtor for my sake;
So him I lose through my unkind abuse.
Him have I lost; thou hast both him and me;
He pays the whole, and yet I am not free."

You can see such words in this Sonnet as "confess", "mortgage", "forfeit", "bond", "surety", "usurer" and "statute" which prove the great dramatist's predilections for the legal jargon.

I can multiply instance after instance from Shakespeare's writings to show that perhaps no other world figure in literature resorted so much to law and legal imageries as Shakespeare had done. The time at our disposal, however, is limited for such purpose. But no brief account of Shakespeare And Law can be complete without at least a bare reference to the controversy about the identity of Shakespeare with that great lawyer Bacon. It is said that Shakespeare was no other than Bacon himself. Not a little support of this theory is drawn from the fact of Shakespeare's almost perfect use of legal terms and his frequent recourse to draw his imageries from the legal world and some of his most faithful portrayals of legal scenes in Courts of Law. Ben Jonson loved Shakespeare and was the friend of Francis Bacon, and to him Shakespeare and Bacon were different persons. Milton who was a child when Shakespeare died and who lived in London and enjoyed the pleasures of the theatrical world always considered Shakespeare to be a different person from Bacon. Charles I was only 16 when Shakespeare died. It is said that Bacon dedicated to Charles I his History of Henry VII. The works of Shakespeare were constant companions Charles for which he was supposed to have been rebuked by Milton because in Milton's puritanism the drama was still a sinful affair. Bacon was the great figure in the Court of Chancery for many years when the battle of Jurisdiction was fought between Ellesmere and Coke. Shakespeare does not appear in any of his works to show any very great interest in Chancery and equity jurisprudence. It must be emphasised that the language of law which Shakespeare spoke and wrote, was the language of the common-law and not of Equity Jurisprudence. He was the great amateur of Common-law and he voiced some of the well-known public grievances against Common-law at the time. Shakespeare dedicated *Venus and Adonis*, and the *Rape of Lucrece*, to the Earl of Southampton, and it is well-known that Shakespeare was the recipient of great munificence at the hands of

that noble man. It has been suggested that if Bacon was the same person as Shakespeare, it is unlikely that within a few years Bacon should have appeared as a counsel voluntarily offering his services against both Essex and Southampton in that trial which besmirched the reputation of Bacon or that Bacon should have taken upon himself in his Declaration of the Treason of Robert, Earl of Essex, the odious task of proving the complicity of his friend and patron in that conspiracy. It is not the object of this talk to come to a decision on the controversy whether Bacon and Shakespeare were the same person or different persons. The reference to such controversy is only to show that it so happens that Shakespeare's name is linked up with the name of Bacon, one of the greatest figures in law. Law, therefore, haunted Shakespeare in life and still hunts his great memory.

CONSTITUTIONAL PROTECTION OF CIVIL RIGHTS IN INDIA

Sri Durga Das Basu

M.A., LL.B. (Cal.)

Joint Secretary to the Government of India and Secretary-in-Charge, Statute Revision, Law Commission of India; author of "Commentary on the Constitution of India".

The extent to which the Constitution of India has adopted the principles laid down by the Covenant on Human Rights is in itself a remarkable indication of the wisdom and liberality of the framers of the Indian Constitution; more so, when it is remembered that the Constitution was drafted as early as 1948 and completed by the third quarter of 1949.

Ever since Dicey made his comparison between the English common law system of maintaining individual rights and the Continental system of constitutional declaration of such rights, the latter has become increasingly common, and modern constitutionalists outside England have few misgivings as to the utility of such declarations. This view has been recognized by the United Nations through its Commission on Human Rights, but the problem with which Dicey was struck in this connection is as relevant to day as it was in 1885. He particularly emphasized the importance of *remedies* to enforce such rights in contrast to their mere assertion in the declaration itself. The need for this procedural safeguard is acknowledged in Article 8 of the Universal Declaration which says :

"Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

The Draft Covenant on Civil and Political Rights, prepared by the Commission on Human Rights in 1952 (Article 3), develops this safeguard by providing that :

"Each State party hereto undertakes—

- (a) To ensure that any person whose rights of freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To develop possibilities of judicial remedy and to ensure that any person claiming such a remedy shall have his right thereto determined by competent authorities, political, administrative or judicial.

That the framers of the Indian Constitution were fully alive to the supreme importance of the judicial remedies to enforce fundamental rights is evident from the fact that not only did they expressly lay down that any law which contravenes any of the fundamental rights shall be 'void' (Article 13) but they also incorporated in the Constitution itself certain extraordinary remedies for enforcing these rights against any State action legislative or executive. Further, the right to make use of these constitutional remedies itself was also guaranteed by the Constitution so that nothing short of an amendment of the Constitution can take away the power of the superior courts, that is, the Supreme Court and the High Courts (in which the power is vested by Articles 32 and 226) to apply these constitutional remedies for the protection of the individual rights guaranteed by the Constitution. The courts have made it clear that they cannot refuse to entertain an application for an appropriate constitutional remedy where a fundamental right has been infringed.

Space does not permit any elaborate treatment of these constitutional remedies here, but it should be mentioned that these remedies consist of what are now called in England 'prerogative orders', namely, *mandamus*, *prohibition*, *quo warranto* and *certiorari*, as well as the writ of *habeas corpus*. The jurisdiction of Indian courts in this connection has been made even more elastic and effective than in England by empowering them to issue not only the 'prerogative orders' but also any direction or order in the nature thereof as may be considered just and proper in the circumstances of each case, unfettered by the technicalities of the English orders.

No less important than the provision for remedies is the formulation of *limitations*, subject to which, the rights declared may be enjoyed; for, since the disappearance of the fetish of *laissez faire* and the emergence of the Welfare State, it is generally acknowledged that the individual can have no absolute or unfettered right in any matter and that the welfare of the individual, as a member of a collective society, lies in a happy compromise between his atomistic rights as an individual and the interests of the society to which he belongs. There is no protection of the rights themselves, unless there is a measure of control and regulation of the rights of each individual in the interests of all. The framers of the Constitution of the United States contented themselves by declaring the rights alone. It was for the Judiciary to evolve various doctrines by which individual rights might be harmonized with collective interests. The Commission on Human Rights, after having drafted the Universal Declaration of Rights, realized the importance of defining the precise limitations which might legitimately be imposed by States, instead of leaving them to the uncontrolled will of the latter; and, for this purpose, the Covenant on Human Rights was drawn up.

The framers of our Constitution likewise realized the importance of formulating definite limitations instead of leaving the courts to devise vague doctrines, such as, that of 'Police Power' or that of 'Due Process' to combat the 'Police Power' itself. We have in Article 19 of the Indian Constitution, which guarantees as many as seven important civil rights, two parts—one declaring the rights themselves and another enumerating precisely the limitations which may be imposed by the State upon the exercise of each of these rights. It has been early laid

down by our Supreme Court that the limitations enumerated in the Article are exhaustive and that the courts cannot uphold the validity of any restrictive State act on grounds other than those specified in the Article itself.

Before taking up the specific civil rights guaranteed by Article 19, we may refer to the basic right of equality before the law.

Right to equality and equal protection before the Law

The guarantee in Article 14 of the Indian Constitution corresponds to Article 20(1) of the Covenant on Human Rights :

Article 20(1) of the Covenant

“All are equal before the law, and shall be accorded equal protection of the law.”

Article 14 of the Indian Constitution

“The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”

Equality before the law is a reality in India inasmuch as the law recognizes no privileged class and every person regardless of his race, religion, wealth, social status or political influence, has a right to sue or to be sued, to prosecute and to be prosecuted for the same kind of action under the ordinary law of the land. The only immunity from legal action that exists is of the heads of State, namely, the President of the Republic or the Governor of a State, under Article 361 of the Constitution. Any possible injury to the individual as a result of this immunity is, however, avoided by declaring in the same Article that the above personal immunity will not bar any action against the Government itself. As regards public officials, it is highly significant that the law does not exempt a public officer from the bounds of ordinary law and that, save for some procedural limitations provided by the law itself to protect the public servants in the *bona fide* discharge of their official duties from harassing litigation, public servants are liable to be tried for their illegal acts in the same courts as ordinary citizens. Instances of such procedural safeguards may be had in Section 80 of the Code of Civil Procedure, 1908, which requires a notice before institution of a civil action, and Section 197 of the Code of Criminal Procedure, 1898, which requires sanction of the Government for a criminal prosecution against a public servant.

The clause relating to equal protection before the laws has received, in a mass of cases, an interpretation similar to that given to the Fourteenth Amendment to the Constitution of the United States by the Supreme Court there. Thus, it has been held that as between persons similarly circumstanced, a law cannot provide for discriminatory privileges or liabilities. In other words, the Legislature cannot discriminate between one person and another, if as regards the subject matter of the legislation their position is the same.

The above guarantee, however, does not take away from the State the power of classifying persons for legitimate purposes, if the classification is based upon some real and substantial

distinction bearing a reasonable and just relation to the object sought to be attained. A Legislature which is to deal with diverse problems arising out of an infinite variety of human relations must, of necessity, have the power of making special laws to attain particular objects; and for that purpose it must have large powers of selection or classification of persons and things upon which such laws are to operate. Such reasonable classification may be based on geographical differences, or differences in time or in the nature of the trade, calling or occupation which it is sought to regulate by the legislation.

The special treatment may even be founded upon difference in degree of public injury or harm; so that the Legislature is not precluded from introducing a reform gradually, i.e., applying the legislation, in the first instance, to some of the institutions or objects or particular areas only according to the exigencies of the situation. The Legislature may even regulate only the aggravated forms of a mischief and such a legislation cannot be challenged as unconstitutional on the ground that it is not all embracing.

Where, however, a statute, on the face of it, shows that the Legislature made no attempt at all to make a classification but singled out a particular individual or class without having any difference peculiar to such individual or class, either for the purpose of conferring a benefit or imposing a burden, the Courts will not hesitate to invalidate such law as offending the guarantee of equal protection. The result will be similar where the Legislature authorizes the Executive to make such selection for special treatment, without providing any guide or standard for such selection or differentiation. The discrimination may consist of an application of a special law of procedure which operates to the prejudice of an accused or other person who is to be affected by a liability. Thus, if a law empowers the Executive, at its option, to subject persons who are similarly situated, to a procedure (say, for the purpose of investigation or assessment of their income) which is substantially different from the ordinary procedure prescribed by the general law which would have been otherwise applicable, such law would be struck down by the Court.

Perhaps the most remarkable application of the guarantee of equal protection in India was made by the Supreme Court in the case of *Ram Prasad v. State of Bihar*. The framers of the Indian Constitution did not consider it necessary to incorporate in the Constitution a specific prohibition against the enactment of a 'Bill of Attainder', presumably because they supposed the evil to have disappeared from the democratic world long ago. But in *Ram Prasad's* case the Indian Supreme Court found the menace rising in a newer shape, and, thanks to the wisdom of the highest tribunal, it lost no time in quelling the judgment by the ingenious application of the Equality Clause, overruling a contrary view taken by the High Court. What happened in this case is that a State Legislature passed an Act declaring that the settlement of land belonging to a private landowner in favour of a lessee 'shall be null and void'. Whether a lease shall be valid or not is, obviously, a private dispute which is to be decided by the ordinary courts of law. Had not the impugned law been enacted, the dispute in the instant case would have been adjudicated in a court of law. The Supreme Court held that the Legislature could

not single out the individual lessee in question and deprive him of such right to have his dispute adjudicated by a court as all other individuals of the land possessed. By doing so, the Legislature had enacted a law which was discriminatory on the face of it and the Court, accordingly, declared it to be void, and restored the parties to their position under the ordinary law. Equal protection is incompatible with *ad hoc* legislation against a particular individual.

Freedom of Speech and Expression

It is interesting to compare the text of Article 19(1)(a) and (2) of the Indian Constitution with that of Article 16(2) and (3) of the Draft Covenant on Civil and Political Rights.

Article 16 (2) and (3) of the Draft Covenant

(2) Everyone shall have the right to freedom of expression; his right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

(3) The exercise of the rights provided in the foregoing paragraph carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall be such only as are provided by law and are necessary, (1) for respect of the rights or reputation of others, (2) for the protection of national security or of public order, or of public health or morals."

Article 19(1)(a) and (2) of our Constitution

"19(1)(a); All citizens shall have the right to freedom of speech and expression.

(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence."

The guarantee in clause (1)(a) above has been given the same amplitude as its universal counterpart by the judicial holding that freedom of expression includes the freedom of propagation of ideas, their publication and circulation, and that the freedom extends to every medium of expression, such as word of mouth, writing, printing or other representation, addressed to the eyes or the ears.

Any restriction imposed upon the above freedom is *prima facie* unconstitutional, unless it can be justified under the limitation clause, i.e., clause (2). This clause authorises the State to impose restrictions upon the freedom of speech only on certain specified grounds so that if, in any particular case, the restrictive law cannot rationally be shown to relate to any of these specified grounds, the law must be held to be void.

In the original Constitution, the grounds for restriction were : defamation; contempt of court; decency or morality; security of the State. The amendment of the Constitution in 1951 has added certain more grounds namely, friendly relations with foreign States, public order,

incitement to an offence. But while the amendment has thus narrowed down the scope of the freedom in one respect, it has strengthened it in a most substantial sense by making it subject to judicial review. This has been done by inserting the word 'reasonable' to qualify the word 'restriction'. In the absence of the word 'reasonable' in the original article, courts were powerless to invalidate a law restricting freedom of expression on the ground that its provisions were procedurally unreasonable or that the restrictions imposed by it were excessive or arbitrary. The only ground on which the courts would interfere until 1951 was that a particular restriction did not relate to any of the grounds specified in the original clause (2).

Since it is not here possible to make an exhaustive treatment of all the grounds of restriction, we may take up some of them and explain the legitimate limits of State interference on that account. Thus, in the interests of *public order*, it is permissible for the State to restrict or penalize speeches inducing persons employed in the essential services to withhold their services or to commit a breach of discipline; or utterings calculated to out rage the religious feelings of any class of the people. To prevent a breach of the peace during a period of emergency (such as communal agitation), temporary restrictions may also be imposed upon the publication of a specified class of matter in newspapers. All such restrictions would, however, be subject to judicial review, the importance of which we may explain with reference to some interesting topics.

Inciting disaffection towards the Government

An intriguing question which has been agitated in the courts of India since the British days is whether the act of merely exciting disaffection or bad feeling towards the Government established for the time being can be punishable under the law. Since the coming into force of the Constitution the further question has arisen whether any law providing for such punishment would itself be constitutionally valid.

Section 121A of the Indian Penal Code provides for the offence of 'Sedition' thus :

"Whoever by words.....or otherwise, brings or attempts to bring into hatred or contempt or excites or attempts to excite disaffection towards the Government established by law in India, shall be punished....."

"Explanation 1.—The expression 'disaffection' includes disloyalty and all feelings of enmity."

In 1942 the Federal Court took a bold step, on the footing of statutory construction, to hold that mere criticism or even ridicule of the Government was not an offence unless it was calculated "to undermine respect of the Government in such a way as to make people cease to obey it and obey the law, so that only anarchy can follow." In short, in the opinion of the Federal Court, the absence of a tendency to cause public disorder or violence was an essential ingredient of the offence under the said Section. But, on appeal, the Privy Council overruled the decision of the Federal Court and held that the offence constituted by the Section had no necessary connection with violence or disorder.

After the coming into force of the Constitution, the Punjab High Court held Section 124A of the Penal Code to be unconstitutional, inasmuch as it was not covered by any of the grounds for restriction which were then specified in clause (2) of Article 19 of the Constitution. That clause, before the amendment of 1951, did not include "public order". The relevant expression was "which undermines the security of the State." The Supreme Court had previously held that mere excitement of disaffection or bad feelings against the Government may not necessarily undermine the security of the State; hence, the Punjab High Court quite logically came to the conclusion that Section 124A of the Penal Code was not covered by the limitation clause (2) of Article 19.

The amendment of clause (2) in 1951 was progressive in one sense and retrograde in another. It was progressive in so far as it introduced the words "reasonable restriction" and gave to the courts the right of review of laws restricting freedom of expression; but it was restrictive so far as it introduced new grounds of limitation, for instance, public order and incitement to an offence. The meaning of the expression "in the interests of public order" came up before the Supreme Court recently. The question for decision was the constitutionality of the provision in Section 295A of the Indian Penal Code. This Section penalized the uttering of words "with deliberate and malicious intention of outraging the religious feelings of any class of citizens of India." The Supreme Court said that the excitement of such religious disaffection has a proximate tendency to cause public disorder if perpetrated with a deliberate and malicious intention of outraging the religious feelings of a class of people. As regards the interpretation of the words "in the interests of public order", the Court agreed with the view taken by the Patna High Court in *Devi Soren v. State of Bihar* that this expression is wider than words like 'for the maintenance of' and that a law might, after the amendment, validly impose restrictions on utterances which have a tendency to cause public disorder but which may not actually lead to a breach of public order.

The *tendency test* introduced by the Supreme Court in the above decision would no doubt require a revision of some of the cases which had invalidated laws prior to the amendment of 1951. The question of validity of Section 124A of the Penal Code has not yet been brought to the Supreme Court. But the fact that the Court approves of the view taken in the Patna case suggests that the Supreme Court might uphold the validity of Section 124A, because the Patna High Court had held that provision to be covered by the expression "in the interests of public order." Nevertheless, the Supreme Court's views of Section 124A would be of great interest to students of constitutional law, particularly in view of the fact that the framers of the original Constitution had refused to follow the decision of the Privy Council and deleted the word 'sedition' from that provision of the Draft Constitution which ultimately became Article 19(2).

Before leaving this topic, it should be pointed out that even under Section 124A of the Penal Code, "expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt

or disaffection” is not punishable. *Disapprobation* becomes *disaffection* when there is a tendency to undermine the authority of the Government.

Criticism of a Minister

A closely connected question is whether the criticism of, or abusive slogans used against, the Ministers individually can be penalised as an offence against the State without violating the permissible limits under Article 19(2) of the Constitution.

Prior to the adoption of the Constitution, the Judicial Committee of the Privy Council had held that the criticism of an individual Minister was punishable under Section 124A of the Indian Penal Code and no question as to the constitutional validity of such law could arise at that time.

As to what would be the position under the Constitution, some light is thrown by the observations of the Supreme Court in a criminal appeal from a conviction under the Punjab Security of the State Act, 1953. Following the language of clause (2) of Article 19 as it stands after the amendment of 1951, Section 9 of the Punjab Act made punishable with imprisonment any person who made or published any speech or statement which

“undermines the security of the State....., public order, decency or morality, or amounts to..... defamation or incitement to an offence prejudicial to the security of the State or the maintenance of public order....”

The Appellants, who were members of a Motor Union, took out a procession against the policy of the Punjab Government to nationalise motor transport, uttering abusive slogans against the Minister of Transport and the Chief Minister, by name. The appellants were convicted on the ground that the utterances (a) undermined public order, (b) undermined decency or morality, and (c) amounted to defamation.

The Supreme Court, on appeal, negated all the grounds levelled against the appellants. As to decency or morality, the Court found that the appellants belonged to a stratum of society where such vulgar abuses were so freely indulged in that they could hardly have any effect on the persons hearing the same. Hence, the abuses in question could not be held to have “*undermined* decency or morality”. More important was the question whether the utterances could be said to have ‘undermined public order’. The case of the prosecution was that some members of the public who had congregated to hear the slogans were ‘annoyed’ and that there might have been a breach of the peace, had there been no police arrangements. The Court found that the evidence fell short of establishing that there would have been a riot, but for the police arrangements, as a result of these utterances against the Ministers, and that, accordingly, it could not be held that the utterances had ‘undermined public order.’

As to defamation the Court held that the utterances were defamatory, but that defamation could be punished under the Security Act only if such defamation was prejudicial to the security of the State or maintenance of the public order. This part of the judgment is worthy of particular notice. The question before the Court was not whether the appellants were punishable for the

offence of defamation under the ordinary criminal law of the land and, as the Court observed, the Ministers, personally, had taken no notice of the utterances. The appellants had been prosecuted under the Security Act, which had been made by the State Legislature under its legislative power relating to 'public order'. Hence, defamation could be punished under the Act only where it was of such a character as to be prejudicial to the maintenance of public order. That it was not of such a character from the finding just referred to, namely, that there was no evidence of the utterances leading to any *reasonable* apprehension of breach of the peace.

The constitutionality of the Act under which the appellant had been convicted was not raised in the case, and the decision rested solely on the interpretation of the statutory provision. Nevertheless, the observations of the Supreme Court are clear enough to indicate the attitude of the Court towards the ambit of Article 19(2) also, since the very language thereof was reproduced in the Act.

It would be legitimate to infer from the above decision that mere '*annoyance*' of the public or some Section thereof would not be tolerated as a ground of restriction of the freedom of expression '*in the interests of public order.*' The connection must be proximate and not remote, as had been held even before the adoption of the Constitution. An insulting statement about another's religion may have a proximate tendency to cause a public disorder but the criticism of a Minister, without more, may not.

In an earlier case, the Supreme Court had held that scurrilous attacks upon a Chief Justice, however gross it might be, could not be restricted in the interests of 'public order'. If such attacks imputed gross partiality in the matter or recruiting judicial officers, the offenders might be dealt with under the ordinary law, but they could not be detained under the Preventive Detention Act which was a special law made for the maintenance of security of the State and public order. The statements in question "could not have any *rational* connection" with the maintenance of public order.

It is difficult to resist the temptation of reproducing the concluding words of the late Mr. Justice Mukherjea in the above case : "The utmost that can be said is that the allegations in the pamphlets are calculated to undermined the confidence of the people in the proper administration of justice in the State. But it is to remote a thing to say therefore that the security of a State or the maintenance of law and order in it would be endangered thereby..... After all, we must judge facts by the ordinary standards of common sense and probability, and it is no answer to say that strange and unexpected things do sometimes happen in this world."

Freedom of the Press .

If the reality of the freedom of the Press in a country is to be judged by the test whether the Press labours under any additional restraints besides those to which every individual is subject, the trend in India since the adoption of the Constitution must be labelled as strikingly progressive.

The only all-India enactment today which applies exclusively to the Press is the Press and Registration of Books Acts, 1867, which requires the registration of the printing presses, newspapers, books and periodicals printed in India. But this enactment does not in reality, impose any *resiriction* upon the press any more than a law requiring registration of births and deaths does upon the individual. The object is merely to secure information relating to printing establishments and their publications. The Act does not impose any sort of censorship, previous restraint or the like. Even though no such law exists in England or the USA, it is significant to note that similar legislation has been advocated in the United States by the President's Committee on Civil Rights. Be that as it may, few people in India object to this measure and its constitutionality has also been judicially upheld. Nor would anybody complain against the Newspaper (Price & Page) Act, 1956, which has been recently enacted to prevent unfair competition among newspapers by regulating the prices charged by newspapers. The latter measure, in fact, conduces to create a better atmosphere for the freedom of expression, in so far as it prevents this potent medium of expression from falling into the hands of monopolists and vested interests.

We cannot, however, overlook the fact that during British days we had special laws of all India application, to deal with the Press and this heritage we maintained as late as the first of February, 1956. Though it would be out of place here to trace the history of such press laws from early times, we should briefly refer to the development since the commencement of the Indian constitution in order to demonstrate the progress made in this connection.

At the coming into force of the Constitution, there was the Indian Press (Emergency) Powers Act, 1931, which imposed on the Press an obligation to furnish security at the call of the Executive. The Act, in short, empowered a Provincial Government to direct a printing press to deposit a security which was liable to be forfeited if the press published any matter by which any of the mischievous acts enumerated in Section 4 of the Act were furthered, e.g., bringing the Government into hatred or contempt or inciting disaffection towards the Government; inciting feelings of hatred and enmity between different classes of subjects; inducing a public servant to resign or neglect his duty. This system of *executive* control and punishment of the Press is foreign to democratic England. The Indian Act was, in fact, an antiquated revival of the trial by Star Chamber of Press offences and the licensing system which English democracy had fought and conquered. The very Preamble of the Act "for the better control of the Press" was offensive.

While the Draft Constitution was under consideration in the Constituent Assembly, the Government of India appointed a Press Laws Enquiry Committee to "review the Press Laws of India with a view to examine if they are in accordance with the fundamental rights formulated by the Constituent Assembly of India." This Committee recommended, *inter alia*, a repeal of the Press (Emergency Powers) Act, 1931, and the incorporation of some of its provisions in the general statutes laying down the law of crimes.

Meanwhile, some of the clauses of the Act were declared to be repugnant to the provisions

of Article 19(2) of then Constitution, as it stood. This led Government to replace the Act of 1931 by a revised measure namely, the Press (Objectionable Matter) Act, 1951, which, however, retained some of the fundamental vices of the old law. The Preamble now looked innocuous as it was 'to provide against the printing and publication of incitement to crime and other objectionable matter.' The other improvements were as follows : while the Act of 1931 was a permanent statute, the Act of 1951 was a temporary one to remain in force for a period of two years; the new Act provided for a *judicial inquiry* by a Sessions Judge before security could be demanded from a printing press or forfeited to Government and the person against whom a complaint had been made, could demand the matter to be determined with the aid of a Jury, and had a right of appeal from the order of the Sessions Judge to the High Court; a change was also made in the clause relating to inciting disaffection towards the Government.

Nevertheless, the very idea of a special law imposing restrictions upon the publication of certain matters instead of leaving them to be punished under the general law was not acceptable to many, and, before the duration of the temporary Act could be extended beyond 1953, the question of further extension of the Act was examined by a Press Commission which the Government had appointed in 1952. The minority of the Commission recommended that the Act should lapse after its current term. The majority sought to rely on internal control of the Press by a Press Council and expressed the desire that Government should drop the special Act after two years if the Press Council succeeded in checking those indulged in the publication of objectionable matter. The implementation of this recommendation by the Government forms a landmark in Indian democracy. The Act of 1951, which had been extended up to February, 1956 was allowed to lapse thereafter and it was also formally included in a subsequent Repealing Act.

But though we have got rid of special Press laws demanding security from the Press as a particular medium of expression, it cannot be suggested that the Press in India is not subject to any restrictions at all, for there is no absolute freedom of the individual in any country with respect to any civil right. Article 2 of the Covenant on the Freedom of information and the Press permits the State to impose restrictions upon the freedom of expression in the interests of national safety; public order; prevention of incitement to alter the system of government by violence or of commission of criminal acts or fraud of obscene publication and the like. The States in India have enactments which impose restrictions upon the freedom of the Press in the interests primarily of public order or public safety, such as the West Bengal Security Act, 1950, Punjab Security of State Act, 1953, Madhya Bharat Public Security Act, 1953. Most of these Acts impose restrictions upon all media of expression in like manner, but there are some Acts, such as the Punjab Special Powers (Press) Act, 1956, which apply particularly to printed matter. A case under the latter Act, which came up before the Supreme Court recently, will clearly demonstrate how the Courts would test the constitutionality of such restrictive laws on the touchstone of reasonableness.

In this case, the Supreme Court invalidated the following provision, namely :

“The State Government or any authority authorised by it in this behalf, if satisfied that such action is necessary for the purpose of preventing or combating any activity prejudicial to the maintenance of communal harmony affecting or likely to affect public order, may, by notification, prohibit the bringing into Punjab of any newspaper, periodical, leaflet or other publication.

The grounds were that the provision was unreasonable both from the substantive and procedural points of view. It was held that it was substantively objectionable because no limitation was imposed either as to the *duration* of the ban on importation authorised by the provision nor as to the *subject-matter* of the publication. It extended to any publication, and might be of an indefinite or unlimited duration. Procedurally, again, it placed the whole matter at the subjective determination of the State Government and there was no provision even for any representation of the party affected. It thus offended against the rules of natural justice.

At the same time, the Court upheld the validity of another section of the same Act which was *not* lacking in the above respects. This was Section 2(1)(a), which ran as follows :

“2(1) The State Government or any authority so authorised in this behalf if satisfied that such action is necessary for the purpose of preventing or combating any activity prejudicial is the *maintenance of communal harmony affecting or likely to affect* public order, may, by order in writing address to a printer, publisher or editor.

“(a) prohibit the printing or publication in any document or any class of documents of any matter relating to a *particular* subject or class of subjects for a *specified period* or in a particular issue or issues of a newspaper or periodical;

“Provided that no such order shall remain in force for more than *two months* from the making thereof;

“Provided further that the person against whom the order has been made may within ten days of the passing of this order make a *representation* to the State Government which may on consideration thereof modify, confirm or rescind the order...”

Freedom of Assembly

The texts of Article 18 of the Covenant and Article 19(1)(b) and (3) of the Indian Constitution are as follows :

Article 18 of the Covenant

“Everyone has the right to freedom of peaceful assembly. No restrictions shall be placed on the exercise of this right other than those prescribed by law and which are necessary to ensure national security, public order, the protection of health or morals or the protection of the rights and freedoms of others.”

Article 19(1)(b) and (3) of the Indian Constitution

“(1)(b)—All citizens shall have the right to assemble peaceably and without arms.

“(3)—Nothing in sub-clause (b) of the said clause shall affect the operation of any existing

law in so far as it imposes or prevents the State from making any law imposing, in the interests of public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.”

It is evident that the limitation clause of *our* Constitution in regard to this right is much more guarded than that of the Covenant. It empowers the State to impose restrictions only on two grounds, namely : (a) that the assembly must be unarmed; and (b) that there should not be any breach of the peace caused by such assembly. A survey of the existing restrictive laws of India would illustrate how the restrictions imposed by the State relate to these two grounds.

In India, there is no common law right to bear arms and nobody can possess or carry arms without obtaining a licence under the Arms Act, 1878. But if a person possesses such a licence, his carrying the arms to a meeting or assembly is not *per se* punishable under the existing law. In other words, the mere carrying of arms to an assembly, which is lawful, by a person who is authorised to possess the arms is not unlawful; but, if the assembly *becomes* unlawful, the possession of a deadly weapon by a member of such an unlawful assembly, even though he possesses a licence for the arms, aggravates his offence, under Section 144 of the Indian Penal Code, 1860. In other words, when an assembly becomes unlawful, the carrying of arms imposes additional penalty on a member of such an assembly apart from the penalty prescribed for membership of an unlawful assembly.

For what constitutes an assembly unlawful, we have to refer to Section 141 of the same Code. A mere assemblage of men in any number cannot be illegal under the law, but an assembly of five or more persons becomes unlawful if the common object of the persons composing the assembly is to commit any of the criminal acts specified in the Section, for instance, to overawe the Government or any public servant in the exercise of his lawful powers or to resist the execution of any law or legal process by means of criminal force or show of criminal force. An assembly of less than five persons may also constitute an offence, if it actually disturbs public peace. Thus, Section 159 of the same Code penalises an ‘affray’ which is committed when two or more persons by assembling in a public place disturb the public peace.

As to restrictions in the interest of public order, it is evident that preventive measures must be taken by the authorities in charge of maintenance of the peace. Hence, regulative powers are conferred upon a police officer by the Police Act, 1861, to direct the conduct and prescribe the route and time for all assemblies and processions along the public routes and also to require the members to apply for a previous licence.

Section 107 of the Criminal Procedure Code, 1898, empowers a magistrate to obtain security for keeping the peace from any person who is likely to commit a breach of the peace, even though nothing has yet been actually committed in that direction.

In England, the question whether a meeting which is by itself lawful can be dispersed or prohibited has raised a nice controversy since the days of *Beatty v. Gilbanks* and though the position is not quite certain, the latest view is that even a lawful meeting may be dispersed

on the ground that others are likely to cause a disturbance of the peace if it is impossible for the authorities to preserve the peace than by dispersing the meeting, and that a refusal to disperse after such an order constitutes an offence. The ultimate interest of maintaining the peace thus constitutes the *rationale* of curbing the individual's right of assembly.

Section 127 of the Indian Criminal Procedure Code, similarly, authorises a magistrate to disperse not only an unlawful assembly but also eq. lawful assembly "if it is likely to cause disturbance of the peace" and Section 151 of the Penal Code makes it an offence not to disperse after a lawful command to disperse has been given.

Section 144 of the Criminal Procedure Code, on the other hand, empowers a magistrate to issue a temporary injunctive order to restrain any assembly, meeting or procession otherwise lawful, if there is a "risk of obstruction, annoyance or injury to any person lawfully employed or danger to human life, health or safety or a disturbance of the public tranquillity or a riot or an affray." It is interesting to note that in the above provision danger to health is also a ground of restraining the assembly. That this is a legitimate ground for restriction few will question, and that is why it is mentioned in Article 18 of the Covenant. Of course, Article 19(3) of the Indian Constitution, as has been already noticed; uses the word "public order" only. But in an early decision, the Supreme Court has observed that dangers to public health might come within the concept of public 'safety' (or freedom from danger) which is included within the wider expression 'public order'.

Preventive powers are conferred also by the State Public Safety Acts, e.g., to impose conditions upon the holding of processions, meetings or assemblies, in the interests of public order or safety or to ban such assemblies within any specified area without the written permission of a prescribed authority, or by the electoral law, for the purpose of maintaining peace at the time of polling.

The validity of all such restrictive provisions is, however, tested by the courts by the touchstone of 'reasonableness'. The courts have thus annulled such restrictive provisions where the law empowered the Government to delegate its power to impose restrictions on assemblies 'to any subordinate officer', irrespective of his rank or status in office.

An enactment of doubtful constitutional validity is the Prevention of Seditious Meeting Act, 1911. It empowers the State Government to declare any area as a "proclaimed area". Upon such a declaration, the District Magistrate or Commissioner of Police is invested with the power to "prohibit any public meeting in such a proclaimed area, if in his opinion such a meeting is likely to promote sedition or disaffection or to cause a disturbance of the public tranquillity."

Now apart from the question of constitutionality of the expressions 'sedition' and 'disaffection' which we have already noticed, this provision runs the risk of being challenged as unconstitutional on another ground; the Act provides that no public meeting "for the furtherance or discussion of any subject likely to cause disturbance or *public excitement*" shall be held in such an area without written notice to the district magistrate or commissioner of

police. We have already referred to the view of the Supreme Court that mere public annoyance does not constitute a menace to 'public order'. Judged in this light, "public excitement" is a vague expression which may not be favoured by the court as a ground of taking preventive action against a meeting.

Freedom of Association

The text of Article 11(1) and (2) of the Covenant on Human Rights, 1950, and Article 19(1) (c) and (4) of the Constitution of India are given below.

Article 11(1) and (2) of the Covenant

'(1) Everyone has the right to freedom of association with others.

"(2) This freedom shall be subject only to such limitations as are pursuant to law and which are necessary for the protection of national security, public order, public safety, health or morals, or the fundamental rights and freedoms of others."

Article 19(1)(c) and (4) of the Indian Constitution

"(1)(c) All citizens have the right to form associations or unions.

"(4) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevents the State from making any law imposing, in the interest, of public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause."

It is evident at once that the guarantee of this freedom in our Constitution is in no way less liberal than that in the Covenant on Human Rights. It guarantees the right not only to form associations but also to continue them, so long as no law made in the interests of public order or morality is contravened. Hence, an association cannot be formed for the purpose of committing a criminal conspiracy. Section 120A of the Indian Penal Code, 1860, penalises a criminal conspiracy which means an agreement between two or more persons to do or cause to be done an illegal act, or an act which is not itself illegal, by illegal means, provided such agreement is followed by some overt act, done in pursuance of the agreement.

Similarly, while the Indian Trade Unions Act, 1926, recognises a trade union as a lawful association and even confers upon it a legal personality, Section 22 of the Industrial Disputes Act, 1947, prohibits certain strikes as well as lock-outs as illegal, for instance, in a public utility service; and Section 26 of that Act prescribes a penalty for participating in such illegal strikes or lock-outs. A provision such as this, which prohibits a strike or a lock-out without in the first instance resorting to the conciliatory machinery provided by the law, cannot be said to constitute an unreasonable restriction upon the freedom of association. A law which provides that a union representing a certain percentage of the workers in an industry will have the right to represent that industry at an 'industrial dispute' to the exclusion of other unions has, similarly, been held as valid.

The limits of State interference with this right have been clearly pronounced by the

Supreme Court in reviewing Section 15(2)(b) of the Indian Criminal Law (Amendment) Act, 1908, as amended by the Madras Act XI of 1950. This provision authorised the State Government to declare any association to be unlawful if the Government was of the opinion that it constituted a danger to the public peace. There was no provision for service of notice upon the members of the association, nor was any opportunity to be given to them for showing cause against the declaration. There was, of course, a provision for reference by the Government to an Advisory Board of any representation that might be made by any such association but no provision for the appearance of the aggrieved persons before that Board. The Supreme Court held this provision as an unreasonable restriction upon the right guaranteed by Article 19(1)(c) on two grounds.

(1) The imposition of penal consequences after declaring an association as unlawful on the subjective satisfaction of the Government without providing for adequate communication of such declaration to the association and its member must be regarded as an unreasonable restriction in the absence of a condition of emergency justifying such a course.

(2) The summary and one-sided review by an Advisory Board cannot be regarded as a reasonable substitute for a judicial enquiry to override the basic freedom of association in the absence of exceptional circumstances.

In short, the view of the Supreme Court was that in the absence of emergency conditions, an association could not be declared to be unlawful for want of judicial verdict. The observations of the Supreme Court in this connection are worthy of citation :

“The right to form associations or unions has such wide and varied scope for its exercise, and its curtailment is fraught with such potential reactions in the religious, political and economic fields, that the vesting of authority in the executive government to impose restrictions on such right, without allowing the grounds of such imposition both in their factual and legal aspects to be duly tested in a judicial enquiry, is a strong element which must be taken into account in judging the reasonableness of the restrictions imposed by S. 15(2)(b) on the exercise of the fundamental right under Art. 19(1)(c).”

The ambit of freedom of association which the employees of the Government can claim has been brought before the courts in several cases. While it is not disputed that a Government servant is also a citizen entitled to this fundamental right and that Government cannot, in the exercise of its power to impose restrictions upon the conduct of its employees, render the exercise of this right illusory, at the same time it has been also laid down that in the interests of securing the integrity of, and discipline in, the services, Government can impose restrictions which may not be reasonable in the case of private individuals. This problem has come to the forefront even in the United States and cases like *United Public Workers v. Mitchell* have been freely referred to in Indian decisions. Though the extent of reasonableness of such restrictions has not yet been decided by the Supreme Court, the High Court decisions may be referred to as illustrating the dividing line between legitimate and unconstitutional interference with the fundamental rights of Government employees.

Thus, while it has been held that a rule which imposes a kind of administrative censorship on the right of association by compelling employees to obtain the previous permission of the authorities before forming a union and prohibits them from becoming members of unions not constituted in accordance with the orders of Government is unconstitutional, the validity of a similar rule which prohibits a Government servant from being a member of an association which consists of persons other than Government servants, has been upheld.

Restrictions upheld in some other cases stand on a more solid ground, as for instance: (a) a rule which prohibits a Government servant to criticise in public any policy pursued or action taken by Government; (b) a rule which prohibits a Government servant to ask for or accept or in any way participate in the raising of any subscription or other pecuniary assistance in pursuance of any object whatsoever, without the previous sanction of the Government.

Freedom of Movement and Residence

Article 19(1)(d)(e) and (5) of our Constitution guarantees freedom of movement and residence within the state in the same manner as Article 11(1)(a) of the Covenant on Human rights, 1950, and Article 10(1)(a) of the Draft Covenant on Civil and Political Rights, 1952.

Article 11(1)(a) of the Covenant

‘Subject to any genral law, adopted for specific reasons of nationl security, public safety or health, everyone has the right to liberty of movement and is free to choose his residence within the borders of each State.’

Article 10(1)(a) of the Draft Covenant

“Subject to any general law of the State concerned which provides for such reasonable restrictions as may be necessary to protect national security, public safety, health or morals or the rights of freedoms of others, consistent with the other rights recognized in this Covenant; everyone legally within the territory, of a State shall, within that territory, have the right to (I) liberty of movement and (II) freedom to choose his residence.”

Article 19(1)(d)(e) and (5) of our Constitution

“(1) All citizens shall have the right...(d) to move freely throughout the territory of India; (e) to reside and settle in any part of the territory of India;

(5) Nothing in sub-clause (d), (e) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevents the State from making any law imposing, resonable restrictions on the exercise of any of the rights conferred by the said sub-clause either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.”

The object of the guarantee of freedom of movement and residence throughout the territory of India is to remove all discriminatory barriers between different parts of the country and to combat the growth of any provincial or parochial feelings. Not only should the individual be free from unlawful or arbitrary limitations at the spot where he for the time being resides,

but he should have, in addition, the liberty of movement to, or settling in, any other part of the country to which he belongs. The question is of special importance in a federal country like India which has political subdivisions of territory.

Like other freedoms, this must also be subject to legitimate restrictions in the public interest. Such restrictions, for instance, are : (a) those imposed to prevent the spreading of infectious diseases as, for example, by means of travelling by public conveyance (Section 71 of the Indian Railways Act, 1890); (b) those imposed for the safety of protected places, the public cannot be allowed to have access indiscriminately without jeopardising the interests of the security of the State (Official Secret Act, 1923); (c) provisions for the "exterment" of persons whose presence in a particular locality endangers the peace and safety of the mass of peaceful citizens of that locality (Section 27 of the City of Bombay Police Act, 1902); or (d) restrictions imposed on habitual offenders (Madras Restriction of Habitual Offenders Act, 1948).

The restrictions imposed must, however, be reasonable. From the substantive stand-point, the duration of the restrictions has been considered to be an important element. Thus, a law which provides for exclusion from an area for an *indefinite* period constitutes, *prima facie*, an unreasonable restriction. As to the maximum period for which a person may be reasonably excluded, the test to be applied is the nature of the mischief which is sought to be remedied and the Supreme Court has made a distinction in this respect between persons participating in political agitations and persons offending against the ordinary criminal law of the land. As regards the former, the court has advocated a shorter period as a condition of reasonableness, but in the case of dangerous characters and habitual offenders, the court would not interfere with such longer period (for instance, two years), as the Legislature may deem necessary to combat the menace.

The Supreme Court has also applied the test as to whether the penalty awarded is in excess of the requirement, to invalidate a law which sought to penalise the influx of unauthorised persons from Pakistan. This Act not only provided for a judicial penalty for breach of the law, but also authorised the Government to remove from India *any person* who entered India from Pakistan, by committing a such as forts or other strategic areas where breach of Permit Regulations or who were reasonably suspected of having committed such a breach. The Court held that the statute could equally apply to an Indian citizen who had visited Pakistan on business and then returned to India without a proper permit; and that the expulsion of an Indian citizen for breach of Permit Regulations was in excess of the requirement, for it amounted to a virtual denial of citizenship; and that further, the law was also procedurally unreasonable as it empowered the Executive to remove a person on its subjective satisfaction. The statute was thus held to constitute an unreasonable restriction of the right guaranteed by Article 19(1)(e). There was, it should be added, a very strong and well reasoned dissent by Mr. Justice Das (the Chief Justice of India) who pointed out that the law was enacted to meet an emergency situation resulting from the partition of Indian and the unhappy trend of events which followed in its train. The interpretation given to the clause however by the majority in this case enlarges

the scope of clause(e) of Article 19(1) beyond the frontiers of India and secures not only freedom of movement unfettered by internal barriers within the territory of India but also freedom of a citizen to move into the territory of India, without any unreasonable restriction. From the international standpoint, thus, the liberality of the majority view is of supreme importance.

Furthermore, it has been held in a number of decisions that a law of “externment” is procedurally unreasonable when it offends the principles of natural justice, as for example, by condemning the person without giving him a right of hearing.

In some cases it has also been held that a law would be invalidated as imposing an unreasonable restriction if it authorises or empowers the Executive to delegate its powers of “externment” to *any* officer irrespective of his rank, knowledge or responsibility, and enables such officer to act on his subjective satisfaction.

The rules of natural justice, however, do not require anything like a judicial trial. It would be sufficient if the opportunity to be heard is offered. Thus, for the “externment” of habitual criminals or gangsters, it would not be unreasonable to provide for a procedure for hearing which does not allow the person affected the right to cross-examine the witnesses who give evidence against him. The reason is that in such cases no witnesses would be willing to depose publicly against such bad characters, for fear of violence to their person or property, and that the object of the legislation would be wholly defeated if a right to confront these witnesses were given to the suspect.

Freedom of Property

The extent to which property rights of the individual are protected against the collective needs depends upon the sociological foundation of a country’s political Constitution and is, accordingly, bound to vary from nation to nation. But, even though there has been a little retrogression from the traditional Anglo-American concept as a result of the fourth amendment of Indian Constitution which has caused misgivings in certain quarters it will be seen presently that even after this amendment the guarantee offered by that Constitution does not fall below the standard laid down by the Universal Declaration of Human Rights.

Article 17 of the Universal Declaration consists of two parts : clause (1) declares the right to own property and clause (2) declares the immunity from arbitrary deprivation of property. The former is dealt with in Article 19(1)(f) & (5), while the latter is dealt with in Article 31(1) of the Indian Constitution. It is convenient to examine them separately.

A. Right to own and enjoy Property

Article 17 of the Declaration

Everyone has the right to own property alone as well as in association with others.”

Article 19(1)(f) and 5 of the Indian Constitution

Clause (1)(f)—“All citizens have the right to acquire, hold and dispose of property.”

Clause (5)—“Nothing in sub-clause (f) of the said clause shall affect the operation of any

existing law in so far as it imposes, or prevents the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.”

It is clear at once that the Indian provision is wider than its universal counterpart since it guarantees not only the right of private *ownership* but also the right to *enjoy* and *dispose* of property free from any restrictions other than reasonable restrictions imposed in the interests of the general public and of certain backward classes called ‘Scheduled Tribes’ who deserve protection from their own improvident acts as might take place if absolute freedom to deal with their properties were allowed.

It would not be practicable to exhaust an enumeration of all the laws which impose restrictions on the right to acquire, hold and dispose of property. But we may refer to some such laws the constitutionality of which has already been upheld by the courts. Thus, it has been held that in the interests of the general public, the State may control letting of houses and of rent in urban areas in view of shortage of accommodation; effect agrarian reform by providing for reduction of rents or relief of agriculturists, indebtedness; restrict the rights of management of the shareholders of a Company in order to ensure the supply of an essential commodity; assume the management of the property of disqualified and extravagant proprietors; control the management of natural resources, such as private forests; regulate the construction of buildings in a municipal area, in the interests of the residents of the locality.

On the other hand, it would not be in the public interests to take the property of one private person simply to give it to another.

The *reasonableness* of the restrictions upon the freedom of property is reviewed by the courts from the substantive as well as procedural aspects.

From the procedural standpoint, the court would not, normally, uphold the validity of a law which authorises the administrative authorities to interfere with the proprietary rights of an individual in the exercise of their unfettered discretion. Thus, even the cancellation of a gun licence cannot be provided for unless the Law requires a communication of the grounds for cancellation to the licensee and an opportunity being given to him to be heard in the matter.

A tenancy law provided that if a landlord habitually infringed the rights of a tenant as specified in that law, he would be deemed to be disqualified to manage his own property and the property would thereupon be taken over by the Court of Wards. The determination of the question whether a landlord had habitually infringed the rights of his tenants was left to the Court of Wards, and there was no procedural safeguard against the discretionary act of that authority. The Supreme Court annulled this provision on the ground that it made the infringement of the right of property to depend entirely on the mere discretion of the Executive and could not, accordingly, be held to be reasonable particularly inasmuch as the measure was a permanent one and did not put a limit to the period of time for which the landlord could

be deprived of the enjoyment of his own property as a result of the subjective determination of the administrative authority.

A State Act for the maintenance of public safety provided for the imposition of a collective fine on the inhabitants of any area in the following terms : “If it appears to the State Government that the inhabitants of any area are concerned in or are abetting the commission of offences prejudicially affecting the maintenance of public order....the State Government may by notification impose a collective fine on the inhabitants of that area.” The High Court of Patna held this provision to constitute an unreasonable restriction upon the freedom of property both from the subjective as well as the procedural standpoint. From the subjective standpoint, the Court held it to be unreasonable because it sought to impose vicarious liability and also because it imposed the penalty in indefinite and vague language and gave no notice to the parties affected as to what conduct it was necessary to follow if the penalty was to be avoided. The decision on this point recalls American decisions like *Screws v. U.S.* and *Burstyn v. Wilson*. Procedurally also, the Court held it to be unreasonable because the Act ousted the jurisdiction of the courts of law and authorised the Executive to impose a penalty on its subjective satisfaction, even without giving a notice to the inhabitants of the area who were going to be affected.

B. Immunity from arbitrary deprivation of property

Article 17(2) of the Declaration

“No one shall be arbitrarily deprived of his property.”

Article 31(1) of the Indian Constitution

“No person shall be deprived of his property save by authority of law.”

While Article 19(1) (f) of our Constitution (already noticed) protects the individual against arbitrary *restrictions* upon the enjoyment of private property. Article 31(1) seeks to protect the individual from *deprivation* of his property by the Executive, without the sanction of the Legislature. In this respect, too, the protection afforded by our Constitution is co-extensive with that under the Universal Declaration and the Supreme Court has already nullified a seizure of a person’s goods by the Police or a revocation by the Government of a proprietary grant made by an Indian Ruler, without the authority of law.

Freedom of Profession

The Constitution of India guarantees another civil right, namely, the right to practise any profession, or to carry on any occupation, trade or business—Subject to specified limitations—which is not so much emphasised in the International Charters except in so far as it is included in the right ‘to work and to free choice of employment’.

Article 19(1)(g) and (6) of the India Constitution provides :

“(1)(g) All citizens shall have the right to practise any profession, or to carry on any occupation, trade or business.”

“(6) Nothing in sub-clause(g) of the said clause shall affect the operation of any existing

law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause, shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to

1. the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

2. the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service whether to the exclusion, complete or partial, of citizens or otherwise.”

It has been held in India that the freedom guaranteed by the above provision includes only the natural right to enter into any trade, calling or profession which every person possesses as a member of a civilised society. It does not extend to rights *created* by statute, which can be enjoyed only subject to the conditions and limitations imposed by the relevant statute. Thus, a lawyer cannot claim a “fundamental” right to appear before any court or authority. For the same reason, none can claim a constitutionally guaranteed right to carry on callings which are so inherently pernicious that civilised society regards it as *res exira commercium*, e.g., gambling.

Among the restrictions which the State may constitutionally impose on the freedom of profession or business “in the interests of the general public” may be mentioned restrictions imposed : on imports and exports for maintaining the economic stability of the country; to protect national industries; on the sale of essential commodities to ensure their equitable distribution and availability at fair prices, on the right to carry on a profession, such as that of a lawyer, to maintain the standards of public life; on the conditions of work and hours of employment in shops and commercial establishments.

As to the restrictions which the State may *reasonably* impose on this freedom, it has been established that no uniform or rigid standard can be formulated. The reasonableness of the restriction will depend upon the *nature* of the business and the conditions prevailing in that trade.

A primary distinction has been drawn by the Supreme Court as between trades which are *inherently* dangerous or injurious to the society, and others.

A. As to trades callings and inherently dangerous or immoral, such as noxious or dangerous goods or trafficking in women or the manufacture or sale of intoxicating liquors, the State can go to the length of totally prohibiting them; and a person will not be heard to say that total prohibition, in such cases, is not a “reasonable” restriction.

B. Even though a business or profession is not inherently dangerous, it may affect a social interest in particular aspects or under particular circumstances. In such cases, therefore, the State has the right to impose restrictions or regulations commensurate with the social interest which has to be protected and relevant to the mischief which has to be averted, e.g., injury to public health, morals, supply of essential services. Some occupations by the noise made in their pursuit, some by the odours they engender and some by the dangers accompanying them,

require regulations as to the locality in which they may be conducted. Some by the dangerous character of the articles used, manufactured or sold, require also special qualifications of the parties permitted to use, manufacture or sell them.

In respect of commodities essential to the community, it is reasonable to have restrictions which may, in certain circumstances, extend to total prohibition for a time, of all normal trading in that commodity. On the other hand, the absolute denial of the right to carry on a normal business to particular persons or to all persons is unreasonable (e.g., the right to carry on wholesale business in vegetables or to establish or maintain a cattle market). Again, a law cannot empower the Government to compel the traders to sell their stock to the Government at *any* rate which may be fixed by the Government at its discretion.

For ensuring equitable distribution of commodities considered essential to the community and their availability at fair prices, it is quite reasonable to regulate the sale of such commodities through licensed vendors to whom quotas are allotted in specified quantities and who are not permitted to sell them beyond the prices that are fixed by the controlling authorities. But if the power of licensing, in respect of a normally available commodity, is left to the absolute discretion of an executive authority without any standard or check to guide or control that discretion, the law would be unreasonable because it subjects the freedom of trade or business to the unfettered discretion of an executive officer and fails to strike a proper balance between the freedom guaranteed by Article 19(1)(g) and the social control permitted by clause(6) of that Article.

For the purpose of preventing agricultural labour available in an area being diverted to non-agricultural pursuits, the State may prohibit employment or engagement in a non-agricultural pursuit, provided the ban is limited to adult persons capable of being engaged in agricultural operations and the ban is confined to the actual agricultural season. If the restriction be in excess of the requirement, it would be struck down by the Court as unreasonable.

Regulations may be made for securing proper conservancy and sanitation at fairs, but a person cannot be denied the right to hold a fair on his own land merely on the ground that permits for holding fairs would not be issued to private individuals.

Freedom of the Person

This topic may be discussed under two heads

A. protection of personal liberty;

B. safeguards against arbitrary arrest or detention, as provided for in Articles 21 and 22, respectively, of the Indian Constitution.

A. Article 21 corresponds to Article 9(1) and (2) of the Covenant.

Article 9(1) and (2) of the Covenant

“(1) No one shall be subjected to arbitrary arrest or detention.”

“(2) No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as established by law.”

Article 21 of the Indian Constitution

“No person shall be deprived of his life or personal liberty except according to procedure established by law.”

The above provision of the Indian Constitution protects a person, whether a citizen or an alien, from arbitrary arrest or detention by the Executive. Before a person is deprived of his life or personal liberty the procedure established by law must be strictly followed and if there is any breach of the procedure or conditions laid down by the law the courts will interfere and set the individual free. The Supreme Court has more than once observed that those who feel called upon to deprive other persons of their personal liberty in the discharge of what they conceive to be their duty, must strictly and scrupulously observe the forms and rules of the law.

As in England or in the United States, the writ of *habeas corpus* is a potent weapon in the hands of the superior courts to secure the release of a prisoner who has been deprived of his liberty in contravention of the legal requirements, and in a number of cases the Supreme Court has already interfered with cases of such arrest, and detention. Even the omission of a court to make an order of remand to custody when adjourning a trial, as required by Section 344 of the Criminal Procedure Code has been used as a good ground for releasing a prisoner under trial.

B. Procedural safeguard against arbitrary arrest and detention is provided for in Article 22(1) to (3) of Indian Constitution, corresponding to Article 9(3) and (4) of the Covenant.

Article 9(3) and (4) of the Covenant

“(3) Any one who is arrested shall be informed promptly of the reasons for his arrest and of any charges against him.”

“(4) Any one arrested or detained on the charge of having committed a crime or of preparing to commit a crime shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. Pending trial, release may be conditioned by guarantees to appear for trial.”

Article 22(1) to (3) of the Indian Constitution

“(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.”

“(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the court of the magistrate, and no such person shall be detained in custody beyond the said period without the authority of a magistrate.”

“(3) Nothing in clauses (1) and (2) shall apply

(a) to any person who for the time being is an enemy alien; or

(b) to any person who is arrested or detained under any law providing for preventive detention.”

It is evident that clause (1) of the above Article of our Constitution improves upon clause (3) of Article 9 of the covenant by guaranteeing a right to be defended by a counsel. The object of the right to be informed of the grounds is that on learning the grounds of arrest, the person arrested is in a position to make an application to the appropriate court for bail, or to move the High Court or the Supreme Court for a writ of *habeas corpus*. The intimation also enables the arrested person to prepare his defence in time for purposes of his trial and when the matter comes before the court in a proceeding for *habeas corpus* it is open to the court to pronounce whether the arresting authority has communicated the grounds as soon as reasonable in the circumstances, and, if it finds that a reasonable time has already passed and the arrested person has not yet been informed of the grounds of his arrest, the court can order his immediate release. The right to consult a legal adviser of his choice from the moment of arrest provides an additional safeguard that the arrested person will be properly represented in the court before which he is required to be produced under clause (2). Even during trial the guarantee in clause(1) is applicable and it has been held that where a trial is held without informing the accused of the date fixed for trial and without giving him an opportunity of getting into communication with his legal adviser, the conviction is liable to be set aside.

Clause(2) of Article 22 of our Constitution makes a specific guarantee on a matter which is left somewhat elastic in clause(4) of Article 9 of the Covenant. Instead of using the word “promptly”, it fixes a definite period of twenty-four hours (excluding the period required for journey from the place of arrest to the court), within which the person arrested must be produced before the nearest magistrate—i.e., a court having criminal powers and acting in a judicial capacity. Once the period of twenty-four hours has passed without compliance with the requirement of this clause, the arrested person is entitled to be released forthwith and the Supreme Court has ordered accordingly in a conspicuous case of arrest under orders of the Speaker of a Legislature. The above provisions of the Constitution thus offer protection against any arbitrary arrest effected by any authority otherwise than under a warrant issued by a court. In any case the arrested person is ensured of a judicial verdict as to the validity of his arrest as early as possible. The procedure to be followed by the court when the arrested person is thus brought before it is laid down in the ordinary law of criminal procedure (cf. Section 167 of the Criminal Procedure Code, 1898).

Clause(3) of the above Article of the Indian Constitution contains something which is not to be found in the covenant on Human Rights but which appears to have been provided for by Article 3 of the Draft Covenant on Civil & Political Rights. It contains an exception from the foregoing guarantees as regards enemy aliens, and persons detained under the law of preventive detention. However, so far as “enemy aliens” are concerned, few will plead for such rights in their favour and the position of an enemy alien in a country such as the United Kingdom is no better.

Preventive detention on the other hand is something not known in the United States of America or the United Kingdom in times of peace. Much has been made of the adoption of this provision in the Indian Constitution, as a permanent measure, authorising preventive detention whether in time of war or of peace. But apart from the special circumstances which necessitated the adoption of this extraordinary measure in the Constitution several facts relating to its working should be considered before adjudging the merits of this provision which is apparently retrograde. Firstly, the Constitution itself, in clauses (4) to (7) of Article 22, provides definite safeguards against any abuse of this power and, secondly, the right of *habeas corpus* has been held available even to person detained under a law of preventive detention enacted in pursuance of the above constitutional provision. Moreover, as will be seen, there have been a number of cases in which the Supreme Court and the High Court have nullified orders of preventive detention, in proceedings for *habeas corpus*. Thirdly, the above provisions of the Constitution are not self-executing but require a law to be made by the Legislature, confirming to the conditions laid down in the Article. The Preventive Detention Act, 1950, has accordingly been passed by the Indian Parliament and, as amended, constitutes at present the law of preventive detention in India. The provisions of this law as they now stand have further safeguarded the rights of the detenu. It should also be borne in mind that if any provision of such a law contravenes the requirements of the Article of the Constitution, it is liable to be challenged in the courts as unconstitutional as happened in the celebrated case of *Gopalan v. State of Madras*. Lastly, if the propriety of a measure is to be judged by the use made of it, it should also be noted that there are today in fact very few persons held in detention under this Act. At the end of 1957 the total was roughly two hundred, and in all probability at the present time it has come down to a handful of men, against whom judicial trial, with the convincing proof as is required in a criminal proceeding, could not be resorted to in the interests of the security of the State. Space does not permit further elaboration of this topic, but we may conclude it with a reference to the powerful control exercised by the Indian judiciary over any possible abuse by the State of this powerful element of administrative machinery.

Thus, the courts have invalidated an order of detention not only where it has violated the requirements of the Act itself, for instance, for failure to communicate the grounds to the detenu within a reasonable time, as required by Section 7 of the Act, but also on the ground that the requirements of Article 22 of the Constitution have been violated. Thus, the court may examine the grounds communicated to the detenu to see if they have a relevant connection with the security of the State or the maintenance of public order, to preserve which preventive detention is sanctioned by the Constitution; or whether the grounds furnished are sufficient to enable the detenu to make an effective representation; or whether the order of detention has been made *mala fide*, i.e., for a purpose other than what the Legislature had in view in passing the law of preventive detention.

Freedom of Religion

The freedom of religion guaranteed by Article 25 of our Constitution is comparable to Article

16 of the Covenant on Human Rights, 1950, to which corresponds Article 15(1) and (3) of the Draft Covenant on Civil and Political Rights, 1952.

Article 16 of the Covenant

“1. Everyone has the right of freedom of thought, conscience religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”

“2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are pursuant to law and are reasonable and necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.”

Article 25 of the Indian Constitution

“(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

“(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law; “(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice :

“(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus...”

Subject to the restrictions which the above Article imposes, every person has a fundamental right under the Indian Constitution not merely to entertain such religious belief as may be approved of by his judgment or conscience but to exhibit his belief and ideas in such other acts as are enjoined by his religion and, further, to propagate his religious views for the edification of others. It is also immaterial whether its propagation is made by a person in his individual capacity or on behalf of any church or institution. Freedom of conscience would be meaningless unless it were supplemented by the unhampered freedom of spiritual conviction in word and action. While freedom of “profession” means right of the believer to state his creed in public, freedom of “practice” means his right to give it expression in forms of private and public worship. The only grounds of restriction to the above freedom, which are mentioned in the Article are : public order, morality and health; regulation of non-religious activity associated with religious practice; social welfare and reform; throwing open of Hindu religious institutions of a public character to all classes of Hindus; other provisions of the Constitution.

To those who have any idea as to what part religion plays in the entire being of the common man in India, the bold pronouncements in the above Article must appear to be astoundingly progressive. It is to be noted that this guarantee is available not only to the citizens of India but to all persons, including aliens. The scope of the above guarantee illustrates the ideal of a secular State envisaged by the framers of the Indian Constitution. We have no established church in India and, notwithstanding the political exploitation of religious faiths

in the past, the Constitution of free India places every person within its boundaries on the same footing of equality and freedom not only in the matter of faith but also in the matter of observance. No better implimentation of the International Covenant could be expected.

The Indian Constitution even improves on the Covenant by supplementing and reinforcing the above guarantee by other provisions. Thus, freedom of practice is supplemented by the guarantee provided in Article 26 under which every religious denomination is entitled to own, acquire and administer property in accordance with the law and subject to regulation in the interests of pulic order, morality and health. The regulation of the right to administer property which is guaranteed by Article 26, does not justify interference with religious practices or performances of acts in pursuance of religious belief, such practices and acts being as much a part of religion as faith or belief in particular doctrines. In the name of controlling the administration of a religious endowment, therefore, neither the State nor any of its agencies has any right to say that particular rights and ceremonies, unless they are unlawful, do not form an essential part of a religion.

There are two other express provisions in the Consitution itself which embody principles laid down in the United State by judicial decisions. Thus, Article 27 expresses the principle in *Everson v. Board of Education*, namely, that no person shall be compelled to pay any taxes the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination. The State being secular, it would be against the policy of the Constitution to allow it to pay out of its public funds any money for the promotion or maintenance of any particular religion.

Again, Section 28 guarantees what has been enunciated in the United States in the case of *McColum v. Board of Education*. It provides that no religious instruction shall be provided in any educational institution wholly maintained out of State funds and that no person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such instruction.

SAFEGUARDS IN A CRIMINAL TRIAL

Immunity from conviction under an ex-post facto law

The safeguard in this respect is provided in clause (1) of Article 20 of the Indian Constitution which is comparable to Article 14 of the Covenant of Human Rights, 1950 and paragraph-1 of Article 13 of the draft Covenant of Civil and Political Rights, 1952 :

Article 14 of the Covenant

“No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.”

Article 20(1) of the Indian Constitutions

“No person shall be convicted of any offence except for violation of a law in force at

the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.”

It is evident that the above provision of the Indian Constitution safeguards the individual against any retroactive criminal legislation in the same way as does the International Covenant. It has been held by the Supreme Court that retrospective operation cannot be given to a law which comes within the purview of the above clause by the use of words such as “shall be deemed to be in force.” As has been held by the Supreme Court, however, the prohibition against such retrospective legislation is confined only to the substantive provisions relating to the creation of an offence and the penalty prescribed therefor and does not extend to the procedure for a trial, nor does it extend to punishments other than a criminal conviction. The substance of the guarantee is that a person cannot be convicted for an act which was not an offence under the law which was in force when that act was committed and that upon conviction he may be subjected to those penalties only which were prescribed by the law in force at the time when the offence was committed. If an additional or higher penalty is prescribed by any change in the law made subsequent to the commission of the offence such change will not operate against him as far as the offence in question is concerned.

Immunity from self-incrimination

The guarantee is clause(3) of Article 20 of the Indian Constitution in this connection is comparable to Article 12(2)(f) of the Draft Covenant on Civil and Political Rights, 1952;

Article 12(2)(f) of the Draft Covenant

“For the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees....not to be compelled to testify against himself...”

Article 20(3) of the Indian Constitution

“No person accused of any offence shall be compelled to be a witness against himself.

This clause of the Indian Constitution gives protection to a person who is accused of an offence, against compulsion to be a witness against himself, but the Supreme Court has *prima facie* enlarged the protection offered by this provision by putting a liberal interpretation on the language so that the guarantee does not in practice, fall below what is offered by the Draft Covenant. Thus, the Supreme Court has observed that the word “witness” is not to be taken in the sense of appearing as a witness but to include any kind of evidence which is reasonably likely to support a prosecution against an accused. Hence, the Court cannot issue a notice or summons to an accused to produce a document which was alleged to be forged. But the power to recover a document by issuing a search warrant through the court has been upheld on the ground that process does not compel the accused to produce the document himself.

Further, it has been held that the word, “witness” includes not only the accused at a trial but also any person against whom a formal accusation has been made which, in the normal course, may result in prosecution. The protection thus extends to any evidence obtained under

compulsion prior to the trial which may in the normal course result in the prosecution of the person from whom such evidence has been obtained. The ambit of the protection has thus been every much widened in the same way as in the United States.

The Article, however, does not apply where there is no likelihood of an *accusation* of a *ariminal* offence.

Immunity From Forced Labour

The provisions of Article 23 of the Indian Constitution are comparable to Article 8 of the Covenant of Human Rights, 1950, and the corresponding Article 7 of the draft Covenant on Civil and Political Rights, 1952.

Article 8 of the Covenant

“1. No one shall be held in slavery; slavery and the slave trade shall be prohibited in all their forms.

“2. No one shall be held in servitude.

“3. No one shall be required to perform forced or compulsory labour except pursuant to a sentence to such punishment for a crime by a competent court.

“4. For the purposes of this Article, the term “forced or compulsory labour” shall not include :

(a) any work, not amounting to hard labour, required to be done in the ordinary course of prison routine by a person undergoing detention imposed by the lawful order of a court;

(b) any service of a military character or, in the case of conscientious objectors, in countries where they are recognised, exacted in virtue of laws requiring compulsory national service;

(c) any service exacted in cases of emergencies or calamities threatening the life or well-being of the community;

(d) any work or service which forms part of the normal civic obligations.”

Article 23 of the Indian Constitution

“(1) Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

“(2) Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

Slavery in its ancient form may not be a problem in most States today, but its newer forms which are labelled in the Indian Constitution under the general term “exploitation” are no less serious a challenge to human freedom and civilization. It is with this consideration in view that the Indian Constitution instead of using the word “slavery”, uses the more comprehensive expression “traffic in human beings” which includes a prohibition not only of slavery but also

of traffic in women or children or the crippled, for immoral or other purposes. The Indian Constitution also prohibits any form of forced labour similar to "begar", an indigenous system under which landlords sometimes used to compel their tenants to render free service. What is prohibited by the clause is therefore compelling a person to render free service where he was lawfully entitled either not to work or to receive remuneration for it. The clause does not, however, prohibit forced labour as a punishment for a criminal offence which is expressly mentioned as an exception in the International Covenant. Further, instead of enumerating particular public purposes such as military or other social or civic purposes, as has been done in the Covenant, the Indian Constitution has adopted the wider expression "public purposes". This expression would cover compulsory recruitment or conscription for social services, as, for example, part of a campaign to reduce mass illiteracy.

LEADERSHIP OF LAWYERS AND JURISTS IN MOVEMENTS FOR LIBERTY AND CONSTITUTIONAL GOVERNMENT

Rush H. Limbaugh*

The republics of India and the United States of America are each committed to the cause of Liberty and the practice of Constitutional Government. By virtue of these commitments, these two great nations stand among their contemporaries as representatives of democracy in the modern world. Although they are geographically almost halfway around the earth from each other, they have these common bonds of aspiration and purpose which unite them in worthy and noble comradeship.

The concepts of liberty and the institutions of constitutional government prevailing in these two countries have evolved from centuries of human experience in many different nations, and in them is encompassed the achievements of great movements for social, religious, economic and political growth and reform which have shocked the conscience of men and disturbed the equilibrium of history in different periods of the progress of mankind. It should be of more than passing interest and, indeed, a constant challenge to the members of the legal profession in these two democratic nations, as well as to lawyers throughout the world, that men who have been trained in the law and who were, in their time, active members of the bar or of the judiciary furnished the organizing skill and genius and contributed effective and dedicated leadership for the success of these age-shaking movements for freedom and democratic government.

In this article we shall reexamine incidents connected with some of these movements,

* *An American lawyer engaged since 1916 in the general practice of his profession at Cape Girardeu, Missouri, a city of 25,000 people, located on the Mississippi River, who recently visited India and delivered lectures before college and university audiences and Advocates and Parliamentary Associations and other organizations, and assisted in conducting legal seminars participated in the lawyers and judges in Madras, Hyderabad, Bombay, Poona and Calcutta. He is a member of the House of Delegates of the American Bar Association, and was Chairman of its Section on real Property, Probate and Trust Law 1954-55; past-President of the Missouri Bar 1955-56; a Fellow of the American College of Trial Lawyers; and also a member of the American Law Institute and the American Judicature Society. He is the author of a Treatise on Missouri Practice, has delivered lectures at colleges and universities and before bar associations in his own country, and he is an occasional contributor of articles to bar journals and law reviews on legal subjects.*

consider the current significance of some of their results, and mention some of the notable contributions made by men of the law to such movements as they have occurred in England, in the United States of America and in India.

I. ENGLAND

The rise and progress of English liberty and the forging of the celebrated instruments constituting her constitutional structure¹ were coeval with the emergence and advancement of the legal profession of England and with the origin and development of her legal and judicial systems. That they occurred contemporaneously could be disregarded as a mere coincidence of history. Nevertheless, it cannot be successfully gainsaid that in the setting of the great landmarks in the progress of English liberty and constitutional development the members of the bench and bar were zealous and skilled workmen.

1. The Ages of Glanvill and Bracton and Magna Carta.

In June, 1215, the barons of England met King John at Runnymede for a series of conferences to determine the exact provisions of an agreement under consideration by them and the King as to the law of the land. An instrument in writing was drafted to evidence that agreement. It was written in Latin. It was signed by the King. It was called Magna Carta.² The name of the instrument in English is the Great Charter. In the English-speaking world it is considered the foundation for the principle that, for the security of the liberties of the people, the law is superior to the will of the king.

Magna Carta was written long before philosophers, political scientists and legal scholars had probed into the essence and the elements of human liberty and before the sources of political power had been defined and classified in terms of their present usage. The subject peoples of the king acquiesced in the prevailing doctrine that legislative power was vested in the king. They demanded that he exercised that power by donating to or granting them a treaty expressing the law. The charter is in the form of a grant by the king "to all freemen of this our realm, these liberties following, to be kept in our kingdom of England forever."

The liberties referred to are set forth in fifty-seven divisions called chapters, some of which were personal, and related to tenure and property, marriage, debt and service. By them it was provided that no aid or scutage could be required of them, except when passed upon by the common council of the realm, thus transferring to them the right of national assembly. The City of London was to have all the ancient liberties and customs it had enjoyed, and other cities and towns were to have similar rights. The charter provided that "no free man shall be taken or imprisoned or disseized or outlawed or exiled or in anywise destroyed, save by the lawful judgment of his peers or the law of the land." It set forth regulations for the administration of justice and it contained a covenant that the king would not sell, deny or delay justice.³

Magna Carta was not throughout a new statement of the law. In fact, it has been said that it contained little that was new but that it confirmed or restored the law already existing

and which the king had lately violated.⁴ "Every one of its brief sentences is aimed at some different object and is full of future law."⁵ Four centuries and more after it was first promulgated, and at an hour of constitutional crisis in the English Parliament, it was said of the Great Charter that it had been confirmed and reconfirmed "by thirty good Kings and thirty good Parliaments."⁶

It could not be expected that a document of such basic and enduring significance in the annals of liberty and government could have come into being except as a result of long and bitter experience and deliberate and skilled craftsmanship. King John had succeeded Richard. Oppressive government had followed the more orderly times of Henry II, when permanent foundations had been laid for the enforcement of a body of law through a system of courts of justice. A treatise on the law had been written during Henry's reign and Ranulf Glanvill, a sheriff and a justiciar for the king, was credited with its authorship. The time became known in the history of English law as the age of Glanvill. It was the beginning of the recorded history of the law and the administration of justice. Through the activities of the lawyers and the courts, the people had become familiar with the ancient customs prevailing in a free and peaceable society. To them the law had become tangible and real. Even the king must recognize and abide by the law.⁷

This was the immediate purpose of the Great Charter. It was a restatement of the principles of liberty to which Englishmen had become accustomed and of the law under which they felt entitled to take refuge. In Chapter 18 it was ordained that the king would appoint for service on the courts only those who know the law. Those who drafted the charter were not only themselves familiar with what the law was and with the processes of the courts through which the law was applied, but they also prepared the way by which in the age of Bracton, one of the great justices of the Kings Bench of the following generation, the doctrine that the king is below the law became permanently established.⁸

2. The Age of Coke and the Petition of Right.

In the course of English history after the adoption of the Great Charter the liberties of the people were further protected by the rise of parliamentary government and the gradual transfer of additional legislative power to the House of Commons. Concurrently with parliamentary ascension the doctrine of judicial independence emerged, and in the time of Chief Justice Coke, one of the most aggressive champions of the liberties of the people under the protection of the law administered by fearless and capable judges, the importance of an independent judiciary came sharply to the public notice.⁹

But against these forces in the struggle of liberty against authority the brazenness and obstinacy of the monarchy occasionally reappeared. A new climax in this struggle occurred in the reign of Charles I. He resorted to attempts to raise money without the consent of Parliament and against the letter and the spirit of the law, and he arbitrarily imprisoned those who refused to pay. He imposed martial law and excluded from Parliament some of its most prominent members.

Against this usurpation of power there arose a movement in Parliament under the

leadership of former Chief Justice Coke which resulted in the adoption of the Petition of Right, acknowledged as one of the additional constitutional documents protecting the liberties of the realm.¹⁰ By the Petition of Right the principles of liberty, now centuries old, were reconfirmed. The Petition was the product of lawyers and it marked another step in the decline of the monarchical power.¹¹

3. Habeas Corpus and the Bill of Rights.

In the further struggle for freedom from monarchical usurpation, extending across the period of the English Revolution of 1688, two additional triumphs were achieved in the adoption of the Habeas Corpus Act in 1679 and the Bill of Rights in 1689. By the Great Charter progress in personal liberty was attained through the provision forbidding imprisonment contrary to law. But lawyers had witnessed the nullification of that provision by abuses of illegal arrests and unlawful imprisonment. By the device of the extraordinary writ of habeas corpus they had, in specific instances, secured the release of victims of these abuses. But they insisted that the right to freedom from false arrest and illegal imprisonment was one of the personal freedoms that was entitled to such constitutional recognition as was afforded by English practice. Conceived, formulated and used by lawyers and judges, the remedy of release from illegal arrest and imprisonment was made effectual in the advance toward freedom in the adoption of the Habeas Corpus Act. It has been claimed for this constitutional instrument that it had the effect of abolishing the feudal system, and the celebrated Blackstone has referred to it as "That great bulwark of our constitution."¹²

Adopted at the termination of the Revolution, the Bill of Rights largely confirmed that which lawyers and judges had already considered to be the law. It was called "An Act Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown." It had the effect of abolishing the doctrine of the Divine Right of Kings. And, as observed by Blackstone, it also had the effect of making "the judges completely independent of the king, his ministers, and his successors."¹³

II. THE UNITED STATES OF AMERICA

1. Povincial Beginnings.

The colonial era in United States history extends across the period from the first settlements at Jamestown in Virginia, in 1607, and at Plymouth in Massachusetts, in 1620, to the beginning of the Revolution, in 1775. During that period people from England, Scotland, Ireland, Germany, Holland, Sweden and other nations migrated to America, established thirteen colonies, laid the foundations of American civilization and increased in numbers to four million. Separated from political and religious persecutions to which some of them had been subjected in their homelands, and released from all legal responsibilities due the governments under which they had formerly lived, except those implicit in the colonial charters granted by the Crown of England, they plunged into the self-disciplining tasks of frontier life and emerged out of a

status of provincial dependence into societies composed of people with a growing sense of self-sufficiency, liberty and stability.¹⁴

Among the permanent additions made to the general structure of American life during the provincial period was the establishment of a body of law, a judicial system and a legal profession. The early colonists were distrustful of lawyers and entertained hopes that a system of law applied by courts would be unnecessary in a free society.¹⁵ This aversion for law and lawyers, which some of the English colonists brought with them from their homeland, persisted for several years and it was, in some instances, evidenced by statutory restrictions against legal practice.¹⁶ But as life became more complex, as commerce and business increased and as problems of government multiplied, the need of law and the necessity for lawyers became manifest. The colonial charters required that the law enacted by colonial legislatures conform with the common law of England, and, since the colonists were familiar with the common law, Virginia took the lead in adopting it, and other colonies in later years took the same course.¹⁷ A system of courts was established in different colonies during the provincial period. These were partially fashioned after the congeries of courts existing in England and they were, to some degree, adapted to the conditions and other institutions prevailing in the colonies.¹⁸ For a long time, laymen served as judges of the colonial courts, and knowledge of the law was not made a prerequisite to judicial service until after the end of the colonial period.¹⁹

It was inevitable that a legal profession of trained men should appear on the colonial scene. Law and courts could not serve their function successfully without capable lawyers. In different periods such lawyers began to appear, and during the years immediately preceding the Revolution, there was a bar of able lawyers in all the colonies. Some of them had received their education at English universities and at the Inns of Court in London. Others were educated in American universities and under American professors of law. Many received their legal knowledge only by reading the law. The times called for that type of private and public service lawyers were prepared to render, and as popular feeling for liberty increased lawyers became more in demand.²⁰ They furnished leadership for setting the fires of revolution, and they contributed materially to the patience, the genius, the wisdom and the faith which kept those fires in control.

A century before national independence Nathaniel Bacon, a young lawyer from England, in an abortive rebellion, led a popular movement against aristocracy.²¹ In 1735, Andrew Hamilton, venerable lawyer of Philadelphia, stood in defiance of an arbitrary provincial governor in the Courts of New York, and won a verdict of a jury vindicating the right of an editor to publish the truth about a public official, and permanently establishing in America the principle of the freedom of the press.²² In 1763, in a country court house in Virginia, Patrick Henry, a zealous and fearless young lawyer, in the celebrated Parsons case²³ lashed out against tyranny in the government and the church. Two years later the same intrepid lawyer, as a member of the House of Burgesses in Virginia, carried resolutions of bitter remonstrance against the validity of the Stamp Act, and in the face of cries of "Treason!" from fellow members he thundered against

the right of the King's government to tax the colonists who had no representation in the House of Commons.²⁴ In Boston, able, honorable and wise lawyer John Adams declined to become advocate General of Admiralty and instead accepted employment of John Hancock in the *Liberty* case where he made the notable defence that the law authorizing the tax involved was unconstitutional and void because it was contrary to the ancient laws and liberties of Englishmen, in that it was enacted without the consent of those to whom it applied.²⁵ Another impassioned New England lawyer, James Otis, argued, in the writs of assistance cases, that the remedies used by the King's officers were against natural equity, the fundamental principles of English law and the laws of God and nature.²⁶ Through the philippics of lawyers, the people became more keenly conscious of their fundamental rights as freemen and more unyielding and relentless against all laws and official conduct tending to subvert such rights.²⁷

2. Revolution and Independence.

The fires of revolution leaped across colonial boundaries and swept into a national blaze. And here again lawyers were in the forefront. In 1754 twenty-four delegates from seven colonies had met in Albany²⁸ to consider methods of common defense and a plan of union. Thirteen of them were lawyers. This was a prototype of future gatherings. In 1765 delegates from nine colonies, with a similar proportion of law-yers, composed a Stamp Act Congress,²⁹ which met at New York, issued a declaration of rights and petitioned the King and Parliament for a redress of grievances. In September and October, 1774, the First Continental Congress met in Philadelphia. Forty-five delegates attended from twelve of the colonies. Twenty-four of them were lawyers.³⁰ One of them said, "Throughout the continent, government is dissolved. Where are now your boundaries? The distinctions between Virginians, Pennsylvanians, New Yorkers and New Englanders are no more. I am not a Virginian, but an American."³¹ Another declared that this Congress "first expressed the sovereign will of a free nation in America."³²

By the time a Second Continental Congress met on May 10, 1775, hostilities had begun. Committees of Correspondence, many of which included lawyers, had kept the people in each colony informed of increasing public indignation and the determined will to resist. Many people declined to follow the course of rising revolt, but it was of no avail. On March 23, 1775, Patrick Henry stood before a Virginian assembly composed of delegates, many of whom were lawyers and who were divided on the question as to whether to appease or to risk war, and boldly shouted, "There is no retreat but in submission and slavery." And, to the consternation of some of his friends, the Virginian patriot-lawyer issued the challenge of the hour in words which became the battlecry of America, "Is life so dear or peace so sweet as to be purchased at the price of chains and slavery? Forbid it, Almighty God! I know not what course others may take, but as for me Give Me liberty or Give Me Death!"³³ By strange coincidence, and unknown to the assembly that heard this irresistible appeal, on the previous day in the House of Commons in London lawyer-trained Edmund Burke counselled his countrymen on conciliation with the colonies in their demand for a redress of grievances. On April 19, 1775, at Lexington and at Concord, the war did begin.

At this crucial hour of colonial history the Second Continental congress met at Philadelphia. The fate of a nation at the gates of the dawn hung before it in unsteady balance. Fifty-six delegates from the thirteen colonies soberly faced their grave responsibilities. Twenty-six of them were lawyers. After providing for a program of defense, the congress, under the leadership of John Adams, selected George Washington, Commander-in-Chief of the Continental Army.³⁴ Adopting Henry's view of the previous year that government was dissolved, it urged each of the colonies to adopt a government, and it created a committee to prepare and submit a plan of confederation for a central government. Lawyers of distinction assisted in the drafting of state constitutions,³⁵ and lawyer John Dickinson was appointed chairman of the first committee to draft Articles of Confederation.³⁶

But the supreme achievement of the Second Continental Congress was the Declaration of Independence. A committee of five members, three of whom were lawyers, was appointed to formulate the Declaration.³⁷ Thomas Jefferson, a lawyer of 33 years of age of Virginia, served as chairman of the committee and wrote the first draft, which but for some minor changes, was approved by the Congress. The Declaration boldly asserted "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new government..."³⁸

This was a Declaration of "self-evident" truths, of a doctrine that political power is vested in the people, of a right of a people to resort to revolution to abolish government that is irresponsive to the laws of nature and destructive of God-given rights. It was an indictment in many counts against the King of Great Britain for tyrannic usurpation of the rights "of a free people". It was a solemn declaration of United colonies of a dissolution of all political connections with Great Britain and of a status of Freedom and Independence. For the support of the Declaration, the members of the Congress "with a firm reliance on the Protection of Divine Providence", and "with a decent respect to the opinions of mankind" mutually pledged to each other "our Lives, our Fortunes and our Sacred Honor."³⁹

3. Constitutional Government

Revolution brought to america not only political reparation from Great Britain and national independence, but it also resulted in the acceptance of new concepts of government and a confirmation of enlarged principles of liberty. The doctrine that all political power and the right to govern is vested in the people, as set forth by Hobbes in his "The Elements of Law, Natural and Politique" and his theory of sovereignty explained in "The Leviathan"; the idea of the sovereignty of the people, and man's right to think as he desires, to worship as he pleases and to exercise freedom of speech, and the superior nature of the legislative power as explained by John Locke in his "Two Treatises of Government"; the doctrine of the separation of powers of government as propounded by Montesquieu in his "Spirit of Laws"; the theory that

government as propounded by Montesquieu in his "Spirit of Laws"; the theory that government should provide the greatest good for the largest number as advocated by Bentham in his "Fragment on Government"; the absolute rights of men to life, liberty and property and the obligation of government to secure these rights, and the auxiliary rights to representation in government, to limitations on the executive power, to apply to courts of justice for a redress of injuries, and to the legislative power for measures of redress when the law and the courts afforded no remedy, as explained with simplicity and with elegance of style by Blackstone in his monumental "Commentaries on the Laws of England"; all these and many more authoritative treatises on law, liberty and government, contributed by the great minds of the world, penetrated the fields of learning among the colonists.⁴⁰ The leaders of the movement for Revolution and Independence, and particularly the lawyers of the time, familiarized themselves with these most advanced ideas and sought zealously to select from them that which seemed the most practical and the most adaptable for use in America.⁴¹

When, by the Declaration of Independence, all former government was dissolved, and when the Continental congress urged each colony to create its own government for all local needs and purposes, construction began on constitutions as frameworks for the colonies now transformed into states. In the formulation of these state constitutions, lawyers were the chief architects and draftsmen. Jefferson in Virginia and Adams in Massachusetts, and literally hundreds of lawyers throughout the colonies, set themselves steadfastly to the task of framing state constitutions through which the most advanced ideas in government could be adapted to the popular institutions serving the people locally. These constitutions served as models for other constitutions adopted by states as they were admitted to the union. This, and the length of time they endured, evidenced the skill and sagacity of those who conceived and constructed them.⁴²

Connecticut organized its state government under its colonial charter. Rhode Island did likewise. But each of the other eleven states separately prepared and promulgated its own constitution. There were basic points of similarity among all of them. Each of them was brief and simple. Each one proceeded on the theory that all political power is vested in the people. Generally, each provided for the three conventional departments of government. In each of them were provisions vesting the broadest political power in the legislative department. Under each of them a legislative body was provided for, which in most instances was bicameral. Each of them, either expressly or by implication, adopted the doctrine of the separation of powers, the most classic expression of which was, "In the government of this commonwealth the executive department shall not exercise the powers of the legislative or judicial, or either of them; the legislative shall not exercise the powers of the executive or judicial, or either of them; the judicial shall not exercise the powers of the executive or legislative, or either of them—to the end it may be a government of laws and not of men."⁴³ Some of them contained provisions similar to those set forth in the Bill of Rights. Like Magna Carta, these new colonial constitutions contained little that was new. They confirmed what the colonists understood from experience were basic, unalienable rights, and they provided for the continuation of institutions

of self-government under which they had lived for many generations in America. They were legal documents prepared with the assistance of men of the law to express the popular will.

To frame and secure the adoption of a constitution for a national government was a far greater problem. There had been no national government prior to the Revolution. There was no legal system or judicial structure operating on a national basis. National crises had demonstrated the necessity for co-ordinated effort, but attempts at inter-colonial government had not advanced beyond conferences participated in by representatives from the different colonies. Proceeding on the theory advanced by Locke that the legislative power is supreme over all powers of government, and responding to the "felt necessities" of the time, the First Continental Congress called a Second Congress, that there should be continuity in the exercise of governmental power. The Second Continental congress, in the exercise of the legislative power vested in it as representative of the people, not only threw off all bonds of allegiance with Great Britain, declared the colonies free and independent states, and promoted the formation of local government under state constitutions, but it also directed that Articles of Confederation for national government be devised that the Congress might thereby become a constitutional instrumentality of that government. The draft of the Articles, prepared largely by John Dickinson, was modified by amendment and adopted by the Congress on November 15, 1777. This draft was submitted to the states for ratification, and on March 1, 1781, it was ratified by the last of the thirteen states.

The Second Continental Congress, by the constitutional process used in the Articles, extended the powers of government by the adoption of what is known as the Ordinance of 1787 for the government of the North-West Territory, that is, the territory lying northwest of the Ohio river. This great document was largely the handiwork of Jefferson, although he was not in attendance at the Congress when it was passed and his draft was not the one that was finally adopted.⁴⁴ The immediate purpose of the Ordinance was to provide a plan for territorial government, but it also reconfirmed ancient principles of liberty contained in prior documents of a constitutional nature, and it set forth, at the hands of the lawyers who prepared it, the basic concepts of rights and liberties which it is the function of government to protect, for the consideration and use of the men who were at the hour of its adoption locked in solemn debate over a constitution for the government of the United States.⁴⁵

The convention which drafted the Constitution of the United States at Philadelphia in 1787 was perhaps the most memorable and the most venerated by Americans of any gathering of men for any purpose on the North American continent. It met at one of the most critical hours of American history. The state of the new nation was desperate. Economic disaster was ominous. Jealousy and suspicion between communities, states and sections were dissipating national cohesion. Patriotic fervour which had sustained the Revolution was subsiding. Faith in government under the Articles of Confederation was vanishing. The power of Congress was waning. Its members were taking leave. There were but 18 delegates from eight states present when the Ordinance of 1787 was adopted. Commissioners from Maryland and Virginia conferred

at Alexandria on urgent problems of trade with which Congress could deal only with languor. Delegates from five states held a convention at Annapolis to consider the grave state of the nation. Alexander Hamilton, New York lawyer, proposed that a convention be held to "strengthen the General Government." Out of the proposal arose a faint hope. On February 21, 1787, the Congress passed a resolution calling for a convention of delegates from the thirteen states to meet in Philadelphia the second Monday in May "for the sole and express purpose of revising the Articles of Confederation." Twelve of the states selected their delegates. Rhode Island declined to elect delegates or participate in the Convention.

On the day set for the meeting delegates from a majority of the states had not arrived in Philadelphia. A rainy season, swollen streams, impassable roads had delayed them. The Commanding General of the Revolution, despite urgent business and financial responsibilities at home and the discomforts from rheumatism, had ridden on horseback alone along trying roads, with his arm in a sling, in time to arrive with his usual military and business punctuality. Venerable, illustrious and beloved Franklin, notwithstanding his fourscore years, was on hand graciously to welcome and encourage his fellow delegates. It was May 25th before a quorum had gathered. On that day organization was perfected and Washington was unanimously elected President of the Convention. Sixty-five delegates had been selected by the different states. Only 55 attended. Of these, one had attended the Albany Congress, three the Stamp Act Congress and seven the First Continental Congress. Altogether, 43 had at some time attended Congress, and 18 were members of Congress at the time. Nine had signed the Declaration of Independence. Ranging in age from Franklin, the eldest, who was 81, to Dayton, the youngest, who was 26, the majority of them were under 40. Among them were men who had become already or who were destined thereafter to become the most prominent men in America.

Of the 55 delegates who attended the Convention, 34 were lawyers. A small number of them, like Madison, had been educated for the law but had not practised. Some of them had received their legal education in England and had been admitted at the Inns of Court. Some had already distinguished themselves by professional achievements and in public service; and many of them thereafter became prominent in high judicial service, in other public offices and as leaders of the profession. Among them was George Wythe, the law teacher at William and Mary College, who was one of the signers of the Declaration of Independence and who had the distinction of serving as instructor of Jefferson, Marshall, Madison and Monroe. Although many of the lawyers who had led in the movement for Independence, including Jefferson, Adams and Henry, were not members of the historic Convention, there were others of high renown who were not only leading lawyers, but also students of political philosophy and the science of government and skilled in politics and statecraft. Among these 34 lawyers of the Convention were Alexander Hamilton of New York; Rufus King and Elbridge Gerry of Massachusetts; Edmund Randolph and James Madison of Virginia; William Samuel Johnson, Oliver Ellsworth and Roger Sherman of Connecticut; William Livingston and William Paterson of New Jersey; Jared Ingersoll, James Wilson and Gouverneur Morris of Pennsylvania; George Read and John

Disckinson of Delaware; John Rutledge, Charles Pinckney of South Carolina; Luther Martin of Maryland; and Abraham Baldwin of Georgia.

With a boldness of spirit and resolution, like unto that by which the Continental Congress declared national independence, the Convention set to work to draft a Federal Constitution providing for the establishment of a new national government. Five days after permanent organization was completed, the delegates of the Convention resolved "that a national government ought to be established consisting of a supreme legislative, executive and judiciary."⁴⁶

With daring audacity they crossed the Rubicon limiting their authority to that of revising the Articles of Confederation and, disregarding any allegiance by which they may have been bound to maintain the government which was responsible for calling them into convention, they proceeded to lay the foundations for a new, more effective and more durable federable government. It was a momentous decision. Some of the delegates declined to support the action and left the Convention.⁴⁷ But others with superb tenacity adhered steadfastly to the paramount purpose. For creating a government of three departments Randolph of Virginia introduced for the consideration of the Convention what was known as the Virginia Plan. Charles Pinckney introduced the South Carolina Plan; William Samuel Johnson, the Connecticut Plan; William Paterson, the New Jersey Plan. Delegates from different states had widely divergent views about the various concepts in the plans. Delegates from small states feared that the national government would encroach on their liberties. Delegates from the large states feared that the national government would encroach on their rights of property. Representation in the legislative department was an insuperable problem. The rights of the legislative department to appropriate money, control commerce and hold in check the executive department each had ardent champions. The nature and powers of the executive department, the selection and jurisdiction of the judiciary, the election and operation of the legislative bodies, and the means for balancing the powers to be exercised by each presented issues highly controversial and dangerously explosive.

Prolonged and bitter debate ensued. Unable to obtain support for their views, additional delegates left the Convention.⁴⁸ But a majority of them cleaved resolutely to the task. Correlation of the major parts of the multiple plans was attempted. Efficacy of the technique of conference and compromise was discovered. Delegates from small states, such as Dickinson and Paterson, found a common meeting ground with delegates from large states, like Franklin and Madison. Proportional representation in one house of the legislative department was acceptable to the delegates from the large states when coupled with equality of representation in the other house, which satisfied the delegates from the small states. One by one the differences were resolved. A system of checks and balances evolved. A committee on detail prepared a final draft. Gouverneur Morris of Pennsylvania supplied the final arrangement of the material and the finished style. Finally, after 100 working days had elapsed, the engrossed document was laid before the Convention on Monday, September 17th, 1787. Forty-two delegates attended this

final session of the Convention. Thirty-nine of them signed the Constitution.⁴⁹ The Convention adjourned. Its handiwork was cast on the waves of destiny.⁵⁰

Concurrently with the approval of the Constitution, the Convention adopted a resolution that the Constitution be laid before Congress and then submitted to a convention of delegates chosen in each state by the people under the recommendation of its legislature, for their assent and ratification, and that when nine of the thirteen states had ratified the Constitution the Congress proceed to call an election and fix a time and place when the President and the Congress elected should meet to execute the Constitution. A letter from General Washington, as President of the Convention and written by order of the Convention, was sent with the Constitution and the resolution of the Convention to the Congress, which on September 28th, 1787, passed unanimously a resolution that they be transmitted to the several legislatures in order that they be submitted to a convention of delegates chosen by the people, as provided by the Constitution. As has been frequently observed, the proceeding was revolutionary. As a result of it one government was substituted for another, and the new Constitution, in effect, abrogated the existing Articles and became the fundamental law.

Two developments of supreme importance occurred during ratification. The one had to do with a transcendent analysis of the Constitution and a deeper understanding of the science of government. The other involved an enlargement of constitutional sanctions for ancient, undisputed, personal liberties. Lawyers were leaders in both developments. Immediately after it became known that the Convention had framed a new federal Constitution, the floodgates of opposition were thrown wide. Scathing and relentless attacks were made upon it. But for the skilled and courageous leadership on the part of illustrious and sagacious lawyers in disseminating among the studious, the enlightened and the cultured of the new nation illuminating information about the paramount merits of the Constitution, the struggle for ratification may have failed. Among the lawyers who furnished that leadership were Alexander Hamilton, who was to become the brilliant Secretary of the Treasury of the first government under the Constitution; James Madison, known as the Father of the Constitution, who was to become Secretary of State under President Jefferson and later President of the United States; and John Jay, who was to become the first Chief Justice of the United States.

From October 27, 1787, until April 7, 1788, these three champions of the cause of the Constitution contributed to a semi-weekly New York newspaper, and other newspapers of the time, a series of articles in which they discussed with brilliant and penetrating analysis and with trenchant and incisive reasoning the essence, the purposes and the operation of representative government, the political and economic philosophy of the proposed Constitution and the advantages to be derived from a union of the states under a federal government provided for by the Constitution. The articles were reprinted in other newspapers and journals. A total of 77 appeared, following which eight additional articles were produced by the same authors. The entire series of 85 was collected and published as a book, entitled "The Federalist".⁵¹ The book was widely circulated.

The immediate aim of the celebrated authors of the Federalist papers in writing these renowned articles was to answer in the forum of public opinion the arguments against the Constitution. But by their contribution of these papers they performed a far more important and enduring purpose. With amazing swiftness they produced a profound commentary and a masterly treatise on the whole subject of constitutional government. They combined the results of prodigious research with consummate skill in reasoning in tracing the rise of government based on constitutions and legal codes from ancient, and to some extent legendary, origins under Minos of Crete, Zaleucus of the Locrians and Lycurgus of Sparta, through the emergence of democratic impulses and the exigencies of unions of states under Theseus of Attica, Draco, Solon and Pericles of Athens and Achaeus of the Achaean League to the constitutional experience of their time. Through the Ecclesia of Athens, the democratic assemblies of the Greek city-states, the Ephori of Sparta, the Tribunes of Rome and the Commons of England they traced the irresistible power of the popular will upon institutions of government to a consummation of the concept that power to govern is vested in the people as confirmed by the opening words of the American Constitution, "We the people of the United States". They reproduced the testimony of Plutarch, Polybius, Montesquieu, Blackstone and other political and legal philosophers and wise men of history in support of the eternal soundness of that concept. The dangers to liberty arising out of usurpations and abuses of political power under different forms of government were considered, and the principle and efficacy of representative government were discussed along with "the turbulence and follies of democracy." The entire Constitution in terms of its broadest concepts, as well as its minutest provisions, was examined, not alone by the results of the experience of other nations, but also, and particularly, by the experience in government in America. Americans could not read the Federalist without feeling a sober consciousness that a fateful hour had struck in the annals of civil history, and that the American people were in a rendezvous with destiny to determine for all time whether "societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force."⁵² Through their production of the Federalist, Hamilton, Madison and Jay were unalterably confirmed in their faith in the future of constitutional government in the United States, and with deep convictions in that faith they not only successfully led the crusade for ratification in those states where opposition was well nigh impregnable, but they also gave themselves unreservedly to the establishment of the government on the high plane of excellence envisioned in the Federalist. The Federalist not only gave its authors added prominence in the higher areas of statesmanship, but it also profoundly influenced the course of constitutional government in America.⁵³

References:

1. England does not have a written constitution in the sense that India and America and other nations having constitutional government have written constitutions. But the Magna Carta and certain acts of Parliament passed subsequent thereto and identified with great fundamental rights

and liberties are usually referred to and they shall be referred to here, as parts of the English Constitution.

2. This document is well known in name by lawyers in English-speaking countries for its historic importance in the evolution of the concept of liberty and the rule of law. When it was originally issued enough copies were supplied for distribution to the churches. It is said that only four of the originals are in existence. Two are in the British Museum and one each is in the Cathedrals of Lincoln and Salisbury.
3. Magna Carta, c. 39, 40, 45.
4. 1 Pollock and Maitland, History of English Law (2nd Ed.) 172; 1 Reeves, History of English Law (Finlason Ed.), Chapter V.
5. 1 Pollock and Maitland, *Ibid.* 171.
6. Catherine Drinkwater Bowen, The Lion and the Throne, The Life and Times of Sir Edward Coke, 484.
7. 1 Pollock and Maitland, Chapters VI and VII, pp. 136-225.
8. *Ibid.*; 1 Reeves, Chapter V.
9. *Ibid.*; Bowen, Parts II and III, The Judgeship and the Parliament Man, pp. 277-472.
10. 4 Blackstone, Commentaries on the Laws of England, 430.
11. Bowen, 498.
12. 4 Commentaries, 431.
13. *Ibid.*, 433.
14. Among the multitude of books concerning this period, that of Charles A. Beard and Mary R. Beard, The Rise of American Civilization, is helpful and authoritative.
15. Charles Warren, History of the American Bar, 3-18; Roscoe Pound, The Lawyer from Antiquity to Modern Times, 130-174.
16. *Ibid.*; Warren, 225.
17. Pound, The Lawyer from Antiquity to Modern times, 134-135.
18. Pound, Organization of Courts, 26-57.
19. *Ibid.*, 250, 251.
20. I Beard, The Rise of American Civilization, 100-103.
21. In his 1 The Life of John Marshall, 6, n. 3, Senator albert J. Beveridge says : "Bacon's Rebellion deserves the careful study of all who would understand the beginnings of the democratic movement in America." See also Robert Douthat Meade, Patrick Henry, 30.
22. State of New York, v. John Peter Zenger, 16 American State Trials, 1-39. [In this celebrated trial, the defendant, who came to America from Germany and published the New York Weekly Journal, a crude four-page folio-size newspaper, was charged with libel for publishing information favourable to the popular cause against illegal and arbitrary acts of the Colonial Governor, William Cosby. Two grand juries had declined to indict the publisher. The Attorney General then filed an information against him and he was jailed. Two attorneys called to defend him were warned by the trial judge of the consequences of their employment, an their names were stricken from the roll of attorneys. Andrew Hamilton of Philadelphia, in his 80th year, went to New York and made a bold and spectacular defense and secured a jury verdict of

acquittal. The case is one of the most notable in American colonial history. Hamilton was called to the bar in Grays Inn in 1713 and was Attorney General of Pennsylvania in 1717.]

23. Known as the Parsons case, the action was one in which a minister, the Reverend James Maury, sued for back pay. His counsel withdrew from what appeared to him a lost cause. Patrick Henry, 27 years old, in practice but four years, took his case and burst into national prominence by his successful appeal to a jury to disregard laws of a salutary nature and uphold the natural rights of man. See William Wirt, Patrick Henry, 37-49; Moses Coit Tyler, Patrick Henry, 36-55; Robert Douthat Meade, Patrick Henry, 114-138.
24. Wirt, 56-85; Tyler, 63-76; Meade, 158-182.
25. Catherine Drinker Bowen, John Adams and the American Revolution, 303-342.
26. *Ibid.*, 203-225.
27. Perhaps the best examples of this were Henry's address to the jury in the Parsons case, his address before the House of Burgesses concerning the Stamp Act and his Liberty or Death address before the Virginia Convention; Hamilton's address before the court and jury in the Zenger case; and Otis' arguments before the courts and juries in the Writs of Assistance cases.
28. This inter-colonial conference or congress held at Albany, New York, was not connected directly with the movement which led to the Revolution, but it is notable here in that it is one of the first indications of the emerging spirit of nationalism in the colonies. Patrick Henry from Virginia attended and met there a number of lawyers from the other colonies.
29. This Congress consisted of 28 delegates. It met to consider problems common to the colonies. Among the lawyers in attendance who were to become nationally prominent were John Dickinson of Pennsylvania, Caesar Rodney of Delaware, and John Rutledge of South Carolina.
30. In this Congress many of the most active lawyers of the colonies, some of whom had never previously seen each other but who were destined to be closely connected with the future fate of the nation, served with distinction. Among them were Peyton Randolph, president of the Congress, Patrick Henry, Edmund Pendleton, Benjamin Harrison of Virginia, John Adams of Massachusetts, John Jay of New York, John Hutchinson of Pennsylvania, John Rutledge of South Carolina, the nearly a score of others.
31. This declaration by Patrick Henry expressed the sentiment of national purpose for which the delegates had met.
32. John Adams thus described the Non-Importation Agreement in the Congress ratified.
33. Although Patrick Henry, the distinguished orator of the Revolution, left no manuscript of his celebrated address, of which that part here quoted was his impassioned peroration. William Wirt, Henry's first biographer, reconstructed it, in the words by which it is known, after conferring with Jefferson and others who heard it. See Wirt's Patrick Henry, Preface, and Section IV.
34. Credit for the selection of Washington is largely due Adams whose courage and wisdom are attested by the fact that John Hancock, wealthy businessman and fellow townsman and client of Adams, was hopeful that he would receive the fateful commission.
35. Warren, History of the American Bar, 39-208; Pound, The Lawyer from Antiquity to Modern Times, 144-174; James Bryce, 1 American Commonwealth.
36. U.S.C.A. Constitution, p. 13, n. 1; Sol Bloom, Formation of the Union under the Constitution, 533.

37. The members of the committee were: Thomas Jefferson, John Adams, Robert R. Livingston, Roger Sherman and Benjamin Franklin, the first four of whom were lawyers.
38. The American Declaration of Independence.
39. *Ibid.*
40. The rise of the democratic movement in western Europe, the evolution of the concept of liberty and the advancement of thinking in the fields of political philosophy and government, all precipitated by the growing sentiment against feudalism and the abuses practised by monarchical government and by the English Revolution of 1688, gave popularity to the works of Locke, Hobbes, Bentham, Motesquieu and Blackstone among the educated people both in Europe and in the American colonies.
41. Pound, *The Lawyer from Antiquity to Modern Times*, 144-174. See also biographies of leading lawyers of the time who assisted in drafting state constitutions.
42. The colonies adopted constitutions as follows: New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina in 1776; New York and Georgia in 1777; Massachusetts in 1780; New Hampshire in 1784; Connecticut operated under her colonial charter until 1818, and New Hampshire did likewise until 1843. See Pound, *Organization of Courts*, 92-102.
43. *The Constitution of Massachusetts*, 1780.
44. Nathan Dane, able lawyer of Beverly, Massachusetts, and later (1823) author of "Abridgement of American Law." as chairman of a committee for the purpose, prepared the final draft. This Ordinance is frequently considered with the Declaration of Independence, the Articles of Confederation and the Constitution as the chief landmarks in the progress of liberty and constitutional government in the United States of America.
45. The Ordinance of 1787 for the Northwest Territorial government was adopted by the Congress on July 13, 1787. The Constitutional Convention of 1787 was in session in Philadelphia from May 25, 1787, until September 17, 1787.
46. 5 Elliott's *Debates on the Constitution*, 134.
47. Among them was Luther Martin of Maryland, who had served as Attorney General of his state and was, for a generation, one of the leading lawyers of the country and was later called by Jefferson "the Federal Bulldog".
48. Among these was Alexander Hamilton, brilliant lawyer of New York, who, despite the failure of the Convention to accept his proposals, kept in touch with the Convention during his absence from its sessions, returned to sign the Constitution when it was completed and became one of its most ingenious and celebrated champions.
49. The three who did not sign were Randolph and Mason of Virginia and Gerry of Massachusetts.
50. There are no complete official reports of the proceedings of the Convention, for the sessions were not open to the public and the Convention had no official reporter. Madison made extensive notes of the discussions, and these are contained in Jonathan Elliott's "Debates in the Several State Conventions, on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia in 1787", in 5 volumes (1896), usually referred to as Elliott's *Debates*. See also Max Farrand, *Records of Federal Convention of 1787* (1911), 3 volumes. For comments on the Convention, its delegates and its work there is a multitude of authorities, only a few of which are: Joseph Story, "Commentaries on the Constitution of the United States," 2 vols; Charles A. Beard, *American Government and Politics* (1912); Charles A. Beard and Mary R.

Beard, *The Rise of American Civilization* (1930), 2 Vols; James Bryce, *American Commonwealth*, Vol. 1 (1888); U.S.C.A.

51. There are numerous editions of *The Federalist*. Although much of its contents had to do with the political and economic conditions of the time when it was written, it is still widely used both in cultured circles and among those who are in public service.
52. Hamilton, *The Federalist*, No. 1.
53. In the historic decision of the Supreme Court of the United States in *Cohens v. Virginia*, 6 Wheat, 264, 418, Chief Justice Marshall said of *The Federalist* and its authors:

"The opinion of the *Federalist* has always been considered as of great authority. It is a complete commentary on our constitution; and is appealed to by all parties in the questions to which that instrument has given birth. Its intrinsic merit entitled it to this high rank; and the part two of its authors performed in framing the constitution put it very much in their power to explain the views which it was framed. These essays having been published while the constitution was before the nation for adoption or rejection, and having been written in answer to objections founded entirely on the extent of its powers, and on its diminution of state sovereignty, are entitled to the more consideration where they frankly avow that the power objected to is given, and defend it..."

THE BORDERLAND OF POLICE POWER AND EMINENT DOMAIN : A COMPARATIVE CONSIDERATION

Clarence J. Sundram

I. GENERAL FRAMEWORK FOR COMPARISON

Before a meaningful comparison of legal structure and method of any two countries is undertaken, it must first be established that there are sufficient similarities to make comparison possible and yet sufficient differences to make comparison fruitful. "While the experience of a foreign country is rarely transferable in full to another's legal system, suggestive ideas can be derived from it to assist in the more rational jurisprudential development of the potential transferee."¹

With respect to land ownership and related problems, there is, of necessity, a fundamental difference in outlook between the United States and India. The population of the United States has not yet reached such proportions as to make the availability of land a serious problem. Thus land-related problems are approached with the assurance of an abundance of land. India, on the other hand, has suffered from a perennial scarcity of land which understandably colors its approach to such problems. Aside from this difference, there are several similarities: both countries have large and diverse societies; both have some measure of institutional stability (political and administrative)²; both have decentralized governments although the United States is perhaps more decentralized;³ and both rely heavily on law to settle disputes. The court systems of the two countries are also vastly different even though both share the heritage of the English common law. Unlike the United States which has separate federal and state court systems, India has an almost entirely unitary system of courts. Thus the jurisdictional problems arising out of concurrent systems of state and federal courts in the United States are absent in India. Absent also are the problems of diverse state and federal law. The existence of a clear bias towards the centre obviates much of the difficulty in resolving state-federal disputes which is present in the United States due to the ninth and tenth amendments. For example, in cases where there is a disputed exercise of the police power, problems arise in the United States if such a power appears to be exercised by the Federal Government. It is generally believed that there is no federal police power⁴—this power being reserved to the state as a concomitant of its sovereignty under the ninth and tenth amendments. Since, however, in India there is no counterpart to the ninth and tenth amendments there does not appear to be any obstacle to a federal exercise of police power and the problem would therefore not arise.

Given a framework for comparison, this paper will study the different approaches of the two countries to the troublesome problem of determining when an exercise of police power ceases and an exercise of the power of eminent domain begins. The legal principles in each country will be examined to consider if either or both could benefit from the other's experience.

II. THE BORDERLAND OF POLICE POWER AND EMINENT DOMAIN IN THE UNITED STATES

Underlying all legal structure in the area of land-use control is a Hobson's choice between full compensation (under eminent domain) and no compensation (under the police power). A land-use regulation that falls as unconstitutional leaves a void. While the public might condemn the affected property to achieve the public objective, in America this does not happen.⁵

The relevant constitutional limitations applying to the area of land-use controls are the provisions contained within the fifth and fourteenth amendments:

No person shall be.....deprived
of life, liberty, or property, with-
out due process of law; nor shall
private property be taken for public
use, without just compensation.⁶

.....[N]or shall any State
deprive any person of life, liberty,
or property, without due process of
law,....⁷

In the early twentieth century the due process clause was held to have both substantive and procedural content. The Supreme Court frequently used the substantive due process concept to invalidate economic and social legislation of both state and federal governments.⁸ However, strong criticism that such action in effect transformed the Court into a "super legislature" led to the demise of the substantive due process concept.⁹ Thus only procedural due process has any continuing viability for present purposes.

The problem involved in differentiating an exercise of police power from the use of eminent domain was succinctly stated by the United States Supreme Court in **Pennsylvania Coal Co. v. Mahon**:¹⁰ "The general rule.....is that while property may be regulated to a certain extent, if the regulation goes too far it will be recognised as a taking....[T]his is a question of degree."¹¹ The question is not one which can be resolved in the abstract but requires consideration of the facts in each situation.¹² Therefore some cases will be examined in an attempt to derive a principle of distinguishing between regulation and taking.

In **Miller v. Schoene**,¹³ plant rust disease from cedar trees was spreading to adjacent apple orchards. The state regulatory power was exercised in destroying the cedar trees. No compensation was paid to the owner. The Court held that there was no violation of due process

since on balance, the apple orchards were more vital to the State of Virginia. It was thus within the state's police power to destroy them in the public interest even at the cost of another's property rights. Similarly, in **Town of Hempstead v. Goldblatt**¹⁴ it was held that an ordinance regulating dredging and pit excavation was a valid exercise of police power even though it had the effect of depriving the mining corporation of the most beneficial use of its property. The Court rationalized its decision by stating that the town's police power was exercised to protect the health and safety of the residents from the noxious use of property by the defendant. This exercise of power could not therefore be burdened by the duty of compensation.¹⁵

On the other hand, in **Dooley v. Town Plan and Zoning Comm'n**,¹⁶ where the actions of the town made the owner's land practically useless, the court held that compensation was necessary. The land was located in a flood plain district and a change in the zoning ordinance prohibited mining. In striking down the ordinance, the court said, "[W]here most of the value of a person's property has to be sacrificed so that community welfare may be served, and where the owner does not directly benefit from the evil avoided.....the occasion is appropriate for the exercise of eminent domain."¹⁷ Similarly, in **City of Plainfield v. Borough of Middlesex**,¹⁸ a zoning ordinance that removed most of the beneficial use from plaintiff's land was struck down as an unconstitutional exercise of police power. The defendant was interested in purchasing a substantial amount of land owned by the plaintiff. When a mutually agreeable price could not be reached, the defendant zoned the land to restrict it for either school or park purposes. The effect of the zoning was to make the land useful only to the defendant which was also the only available buyer. The court held that this was a taking of plaintiff's property without just compensation.¹⁹

A developing remedy for the landowner adversely affected by an abuse of the exercise of police power is a suit for inverse condemnation. This means that the landowner forces the sovereign to condemn his property and to compensate him for the taking.²⁰

Even a cursory glance at the cases discussed above shows the confusion and anomalous results in the area and demonstrates the need for a clear guiding principle. At least three legal scholars have attempted to formulate such a principle.

A. THE DUNHAM TEST²¹

Professor Dunham starts with the premise that **United States ex rel. T.V.A. v. Welch**²² and **Berman v. Parker**²³ did away with the use of objective tests for determining when compensation was necessary. Prior to these cases, the objective test was the "public use" test, i.e., if the land taken was going to be used by an appreciable segment of the public after condemnation, then the taking was for a public use and, under the fifth amendment, compensation was required. Since **Berman** and **Welch** definitively established that use by the public is not essential to the power of condemnation such a cut-and-dried test is no longer possible. But, on the other hand, these cases enlarge the legislative responsibility insofar as they free the legislature from the inability to pay compensation for a restriction on the use of property even where the legislature thought it just to do so. After **Berman** and **Welch**, if the power to regulate exists,

the question whether there should be regulation without compensation or a taking with compensation becomes a matter of legislative judgement. Dunham comments that there is a tendency to substitute vague ethical standards for any objective standard.²⁴

The test suggested by Dunham is basically that established in **Nashville, C. & St. L. Ry. v. Walters**,²⁵ that compensation must be paid for a loss suffered by an owner to create a public benefit but need not be paid for a loss suffered when government merely removes a harm created by an owner or his property. Stated differently, the government need not compensate an owner for curbing his noxious use of property but must do so if it compels him to act positively for the public good. Dunham argues that this test contains elements of objectivity since there must be a relationship between the harm and the regulated activity for the regulation without compensation to be valid.²⁶ There is also an element of subjectivity since even with the requisite causation the regulation may be invalid if the cost to the regulated party is too onerous. The fact that the regulation will benefit the public is not enough reason to destroy the property without compensation.²⁷ Destruction is justified only to "eliminate evil" and compensation need not be paid unless the loss inflicted is one the individual should not be expected to bear.²⁸

The test has at least two deficiencies. First, the courts have not stated a guiding principle to determine when an owner's expectation is protected against government action. Second, it is susceptible to manipulation and semantic obfuscation. The prevention of a harmful use can be phrased in terms of conferring a public benefit requiring compensation. The test would probably be as difficult to apply as those it seeks to replace.

B. THE SAX TEST²⁹

Precisely stated, the rule is as follows:

[W]hen an individual or limited group in society sustains a detriment to legally acquired existing economic values as a consequence of government activity which enhances the economic value of some governmental enterprise, then the act is a taking, and compensation is constitutionally required; but when the challenged act is an improvement of the public condition through resolution of conflict with in the private sector of the society, compensation is not constitutionally required.³⁰

Basically, Sax distinguishes between the government's entrepreneurial and proprietary interests and its regulatory function. If government is acting in a proprietary capacity and is in that sense in competition with private landowners and it restricts or regulates private land for its own purpose, compensation should be paid. If, however, government is acting as an arbitrator between competing private interests and has no interest of its own, then there is no reason to compensate for the adverse effect of the regulation.

The test is concerned with the effect of governmental action on the morale of the private sector. For a government to function effectively it is essential that people have confidence in it and that they do not feel that it is acting arbitrarily. This goes to the natural justice notion

that the appearance of justice is almost as important as the fact of justice. Therefore, when government is competing with private owners and its motives are more open to question, there is a high risk that its actions could be seen as being arbitrary. This feeling would have a demoralizing effect on landowners. To avoid this, government should compensate for the adverse effect of regulation.

On the other hand, where government has no interest of its own and is acting as an umpire there is less chance that its actions will be viewed as arbitrary unless it is on record as favouring one interest over another. The landowner will be less reluctant to comply with regulations if they feel government action is objective and for the public good. Since the risk of the demoralizing effect on the people is slight, there is no reason to compensate.

Under the Sax Test, **Goldblatt** was a clear case recognizable as non-compensable. "The Zoning regulation in those situations does not add to the resources of any official enterprise; it is the regulatee's neighbours as citizens who benefit directly. The industrial user has simply been subjected to a competition with his new neighbours, and he has lost."³² Sax also believes that **Miller v. Schoene** was decided correctly.

The difficulties created by looking at the extent of harm, the imposition of economic loss on one person to aid another, or the lack of a formal invasion are all eliminated if one concentrates on the critical fact that the regulation at issue did not add to the assets of any government enterprise, but merely resolved a case of conflicting uses between neighbouring proprietors.

However, he ignores the state's clear bias in favour of the apple industry which detracts from its efficacy as an adjudicator. The risk of demoralizing effect, about which Sax expressed his concern, is present where as here the decision maker does not approach the situation without any pre-conceived biases.

The fundamental difficulty with Sax' approach is that it assumes that the many and varied roles of government in a large and complex society are easily susceptible of classification as "regulatory" or "proprietary." It would be impossible to apply this test with any measure of consistency especially where more than one arm of government is involved and where different governmental bodies have conflicting interests.

C. THE MICHELMAN TEST³⁴

Michelman disagrees with Sax' analysis of the problem. Confronted with a bewildering array of judicial rules for when government must compensate people for economic losses caused by its programmes, he concludes that the line now drawn between compensable and non-compensable harms diverges from what considerations of utility or fairness would suggest. But he accepts the confused situation as the product of a system which relies on judicial decisions for solutions.

This approach is both economic and philosophical. People will bear the adverse effect of regulation if they feel that the overall pattern of governmental action will ultimately benefit them. He is concerned about the reasonable expectations of the property owners. If there is

a reasonable expectation of compensation, and if the regulation defeats the expectation, there may be a demoralizing effect on the property holders. When this effect is so great that people no longer feel that they are bearing their just share of the burdens for the public good, then compensation should be paid to ameliorate this effect. Furthermore, if the impact of the regulation falls upon a narrow class of persons and has the effect or the appearance of a governmental redistribution of property, then the government should attempt to find some basis to justify payment of compensation.³⁵

Michelman concludes that the legislatures and administrative agencies must take the responsibility for formulating relevant rules for compensation and thus far at least they have not met their obligations. Until they do, the existing confusion is the best that can be achieved by our system.

III. THE BORDERLAND OF POLICE POWER AND EMINENT DOMAIN IN INDIA

In India, as in the United States, the line between the two types of state interference with property rights is 'thin and jagged.'³⁶ Prior to the Berman case, there was in the United States a distinction between public purpose and public use and this distinction served as a guide to the necessity of compensation. Article 19 of the Indian Constitution however, does not provide any clue as to whether the framers of the Constitution really addressed themselves to the problem of distinguishing between compensable takings and non-compensable regulations [apart from the exception from the compensation requirement of laws "for the promotion of public health or the prevention of danger to life or property" in Article 31(5) (b) (ii)]. Therefore, as in the United States, it became the duty of the Indian Supreme Court to determine where the line should be drawn.

A public purpose in India is present even though individuals are benefited by governmental action. The limitation is that they cannot be benefited solely as individuals. The benefit must occur in furtherance of a scheme of public benefit or utility and must be incidental to it.³⁷ In this aspect, Indian law is not unlike the American experience.

Before pursuing an analysis of the Indian case law in the area, it might be helpful to consider the relevant provisions in the Indian Constitution.

Art. 19 (1) All citizens shall have the right—

... ..

(f) to acquire, hold and dispose of property;

... ..

(5) Nothing in sub-clauses (d), (e) and (f) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Schedule Tribe.

Art. 31 (1) No person shall be deprived of his property save by authority of law.

- (2) No property, movable or immovable, including any interest in, or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorizing the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given.

After the Fourth Amendment was added,

Art. 31(2) reads as follows:

- (2) No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which, and the manner in which the compensation is to be determined and given; no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate.
- (2A) Where a law does not provide for the transfer of the ownership or right to possession of any property to the State or to a corporation owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property, notwithstanding that it deprives any person of his property.

One of the major differences that an observer notices between the relevant provisions of the Indian and American constitutions is the absence of a “due process” clause in the former. Thus, although the tests of “reasonableness” laid down in clauses (2) through (6) of Art. 19 may greatly coincide with the test for judging due process under the American constitution, the two are not identical. The Indian constitution-makers deliberately avoided the use of the “due process” language finding it far too comprehensive, flexible and vague. Instead they chose the word “reasonable” as a more definite standard. Thus American decisional law cannot be transplanted into the Indian context without some allowance for the differences in constitutional requirements.³⁸ The Indian Constitution also used the language “procedure established by law” and that phrase has been interpreted to mean what is called procedural due process in America.³⁹ In other words, a legislative enactment which complied with procedural requirements. (*e.g.*, notice, hearing, etc.) could not be challenged on the grounds of unreasonableness.

In a series of later cases,⁴⁰ it became established doctrine that Article 19 (I) (f) and (g) were available to protect specific property rights of individual citizens against “unreasonable” state restrictions. Thus there had emerged one trend of doctrine that helped to draw a principled, if not very predictable, line between the rules that apply to ‘takings’ (to use the broader American term) and to regulation as something less than

a "taking"; an unreasonable "restriction" of a citizen's right to hold a particular piece of property or to carry on a particular business was invalid under Article 19.⁴¹

This interpretation creates an overlap between Articles 19 and 31. Thus a state interference would be susceptible to attack either as a deprivation of property without compensation under Art. 31 or as an unreasonable restriction on the right to hold property under Art. 19.⁴²

Under **A. K. Gopalan v. State of Madras**⁴³ the Supreme Court indicated that if a restriction on the exercise of a property right or the conduct of business was so severe as to be "total" and therefore a deprivation, its constitutionality had to be tested under Art. 31. Article 19 would not apply. The rationale, in so far as it is discernible, seems to be that rights guaranteed by Art. 19(1) (f) can only be enjoyed provided the citizen is in a position to enjoy them. The argument is that a citizen cannot say that he has a right to hold and dispose of property if that property has been validly taken away from him under Articles 31(1) or (2). Under this rationale, the proper approach to the question is to consider first whether the effect of the legislation is either to deprive the citizen of his property under Art 31(1) or to acquire it or take possession of it under Art. 31(2). If either is answered affirmatively, then the only question left is whether the citizen has any rights left to assert under Art. 19(1) (f) after the deprivation, acquisition or taking of possession. It becomes crucial therefore to be able to determine what is a deprivation.

No cut and dried test can be formulated as to whether in a given case the owner is 'deprived' of his property within the meaning of Article 31; each case must be decided as it arises on its own facts. Broadly speaking, it may be said that an abridgement would be so substantial as to amount to a deprivation within the meaning of Article 31 if, in effect, it withheld the property from the possession and enjoyment of the owners, or seriously impaired its use and enjoyment by him or materially reduced its value.⁴⁴

In **Dwarkadas Shrinivas v. Sholapur Spinning & Weaving Co. Ltd.**⁴⁵ the government took over the operation of the mill and attempted to raise capital from the preference shareholders. Plaintiff shareholder ultimately obtained a judgement from the Supreme Court holding that the legislation under which the state acted authorized in effect a deprivation of property without compensation within the meaning of Article 31. The exception in Article 31(5) (b) (ii) was held inapplicable. Thus the ordinance violated the fundamental rights of the company under Art. 31(2). The Court noted that the ordinance was not merely regulatory but resulted in a taking of practically all the incidents of ownership leaving a mere husk of title in the owner. The test the Court seemed to apply was to consider the extent of the infringement of property rights.

Shortly after **Subodh Gopal and Dwarkadas Shrinivas** the Fourth Amendment was passed, the minority view in **Subodh Gopal** which saw "deprivation" in Art. 31(1) as separate and distinct from "acquisition" or "taking possession" in Art. 31(2). Under this view a deprivation was constitutionally protected only to the extent that it required authorization by law, that is, it required an enactment by a competent legislature. There could be no

deprivation by executive fiat. For acquisition or taking possession, compensation was required. "This interpretation left unprotected from parliamentary action the most drastic sort of interference with property rights—their complete elimination—so long as the state did not formally take title or possession."⁴⁶ Under the Fourth Amendment Art. 31(2) dealt with the power of eminent domain while Art. 31(1) dealt with the police power. Application of Art. 31(2) was barred where the government taking or deprivation did not transfer title or possession to the state. The test thus announced is seemingly simple—one merely has to determine if title or possession has been transferred. This appears to be much more objective than any of the tests announced either by courts or by scholars in the United States. The only problem left to determine is when does title vest in the state? Is that part of **Dwarkadas Shrinivas** which considered the government taking of everything except title to be an acquisition, still viable after the Fourth Amendment? The answer to this question has not been definitively settled.

In 1960, the Supreme Court closed a gap in the law created by the Fourth Amendment. In deciding **Kochuni v. State of Kerela**,⁴⁷ the court said that the law under which there could be a deprivation under Art. 31(I) had to be a valid law consistent with other fundamental rights, especially Art. 19. Thus, the decision protects land owners from arbitrary and unreasonable deprivations because the question is not justiciable by the courts under Art. 19(5).

IV. CONCLUSION

Considering the fact that the United States has had two hundred years to iron out the "bugs" in its legal system, one would expect it to have a more workable solution to the troublesome problem of regulation and taking than a "young" country like India which has had barely over twenty years under a constitution to do the same job. As Michelman suggests, the only definitive solution that can be hoped for is one formulated by legislative bodies which have thus far abdicated their responsibilities. As the Indian experience under the Fourth Amendment indicates, the law can be cleared up in some measure by uniform rules which do not rely upon the whim of individual judges for their existence. This is not to suggest that the Fourth Amendment has been a panacea for all the problems in the area; but it can be stated that the amendment has settled the law to a greater extent than appears possible in America in the foreseeable future. To be sure, the greater independence of the states and the numerous different court systems in America pose problems which the Indian Parliament did not have to overcome. But this writer is confident that if a genuine desire to bring a measure of clarity and predictability to the law exists, the famous "yankee ingenuity" can overcome the obstacles.

Footnotes :

1. Sharma, *Protection of the Rights of the Accused in the United States and in India: A General Framework for Comparison* 13 (1971) (Unpublished manuscript on file at the Buffalo Law Review).
2. For how much longer this statement will be true, is not clear at present. Both countries are experiencing severe social and political upheaval which promises to test to the limit the strength of their institutions. Chaos has reigned in parts of India, especially West Bengal where Naxalities

have run rampant with seeming impunity. Hopefully the worst is over for India—the landslide victory of the Congress Party may enable the Government to consolidate its strength and to restore the country to a measure of stability unknown in the past few years. No such reprieve appears to be in sight for the United States. If anything, the converse is true. The Nixon Administration appears to be the perfect foil for those bent on unorthodox and often violent means of social and political change (including physical destruction of institutions representing different ideologies).

3. The Indian Federation, unlike the American, did not arise out of a pact between several sovereign states, which knit themselves together, surrendering some of their sovereign or autonomous powers to the general government. It came into being as an expedient whereby states heterogeneous in themselves might be joined into a national union. The Indian provinces were, before 1950, units formed on the basis of administrative convenience with negligible autonomy of their own. The Constitution-makers had to create simultaneously, as did the framers of the Government of India Act of 1935, a general government with constituent regional units. While the Constitution of the United States served simply as the Constitution of the national government, leaving it in the main to the states to continue to preserve their own constitutions by Convention (or in the case of new admissions—to draw up their own constitutions by a convention) or to amend them, the Indian Constitution....serves both as the composite Constitution of the federation (the Union of India) and of each of the constituent states. Sharma, *supra* note 1, at 14-15 (footnotes omitted). Furthermore, the Indian Constitution lacks an equivalent of the American ninth and tenth amendments, reserving unspecified "powers" not delegated to the federal government to the individual states or the people. General residuum authority under the Indian Constitution is vested in the Union Government. *Id.* at 17.
4. *But see* Cushman, *The National Police Power Under the Commerce Clause of the Constitution*, 31 Minn. L. Rev. 289, 381, 452 (1919); Cushman, *National Police Power Under the Taxing Clause of the Constitution*, 4 Minn. L. Rev. 247 (1920); Cushman, *National Police Power Under the Postal Clause of the Constitution*, 4 Minn. L. Rev. 402 (1920).
5. *D. Mandelker, Managing Our Urban Environment* 501 (1961).
6. U. S. Const. amend. V (1791).
7. U. S. Const. amend. XIV (1868).
8. *See, e.g.,* Ribnik v. McBride, 277 U. S. 350 (1928); Adkins v. Children's Hospital, 261 U.S. 525 (1923) and Lochner v. New York, 198 U.S. 45(1950).
9. *See* United States v. Darby, 312 U.S. 100 (1941); West Coast Hotel v. Parrish, 300 U.S. 379 (1937); Nebbia v. New York, 291 U.S. 502 (1934). *See general* McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 Sup. Ct. Rev. 34; R. Jackson, *The Struggle for Judicial Supremacy* 86-236 (1941).
10. 260 U.S. 393 (1922).
11. *Id.* at 415.
12. Commissioner of Natural Resources v. Volpe, 206 N.E. 2d 666 (Mass. 1965).
13. 276 U.S. 272 (1928).
14. 369 U.S. 590 (1962).
15. The court, in this instance, chose to ignore what seemed to be a deliberate attempt to force the defendant corporation out of the town. Prior to the instant regulating ordinance, the town

had attempted to zone out the defendant. That attempt failed because the defendants were found to be conducting a perior non-conforming use on the premises. In justifying the ordinance here the court said that the means of removing the harm were reasonably necessary and not unduly oppressive. It is not clear why a high wire fence would not have prevented the harm—the danger of children falling into the pit—equally well, and at a lesser cost. The only explanation for the decision, at least to this writer, appears to be the ineffective advocacy of defendant's counsel in failing to point out to the court the existence of less burdensome alternative means of remedying the harm.

16. 151 Conn. 304, 197 A 2d 770 (1964).
17. *Id.* at 311-12, 197 A. 2d at 773-74. The principle of law enunciated in *Dooley* would appear to be equally applicable to *Goldblatt* thus mandating an opposite result. It is significant that *Dooley* was decided two years after the Supreme Court decision in *Goldblatt*.
18. 69 N. J. Super. 136, 173 A 2d 785 (1961).
19. On the question of taking by zoning, *see generally*, Annot. 95 A.L.R. 2d 725 (1964). A variety of cases have held, in varying factual situations that the purported regulation was in fact a taking of proerty. *See e.g.*, *Forde v. Miami Beach*, 146 Fla. 676, 685, 1 So. 2d 642 (1941); *Aronson v. Sharon*, 346 Mass. 598, 195 N. E. 2d 314 (1964); *Jenches v. Building Comm'r of Brookline*, 341 Mass. 162, 167 N. E. 2d 757 (1960); *Gem Properties, Inc. v. Board of Appeals of Milton*, 314 Mass. 99, 167 N. E. 2d, 315 (1960); *Barney & Carey Co. v. Milton*, 324 Mass. 440, 87 N. E. 2d 9 (1949); *Morris County Land Improvement Co. v. Township of Parsippany—Troy Hills*, 40 N. J. 539, 193 A. 2d 232 (1963); *Grosso v. Board of Adjustment of the Township of Milburn*, 137, N. J. L. 630, 61, A. 2d 167 (1948); *Vernon Park Realty v. City of Mt. Vernon*, 307 N. Y. 493, 121 N. E. 2d 517 (1954); *Arverne Bey Constr. Co. v. Thatcher*, 278 N. Y. 222, 15 N. E. 2d. 587, 117 A. L. R. 1110 (1938); *State ex rel. Sun Oil Co. v. City of Euclid*, 164, Ohio St. 265, 130 N. E. 2d 336 (1955); *Miller v. City of Beaver Falls*, 368 Pa. 189, 82 A. 2d 34 (1951).
20. *See generally* Mandelker, *Inverse Condemnation: The Constitutional Limits of Public Responsibility*, EFPP *Wis. L. Rev.* 3; Note, *Eminent Domain—Right and Remedies of an Uncompensated Landowner*, 1962 *Wash. U.L.Q.* 210; *Beuscher, Land Use Controls*, 538 (1964). For an example of the exercise of inverse condemnation *see* *Thronberg v. Port of Partland*, 233 Ore. 178, 376 p. 2d 100 (1962). Most courts, however, have denied inverse damages which have been predicated on police power regulations, *Gasque v. Town of Conway*, 194 S.C. 15. 8 S.E. 2d 871 (1940).
21. *Dunham, Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*. 1962 *Sup. Ct. Rev.* 63.
22. 327 U.S. 546 (1946).
23. 348 U.S. 26 (1954).
24. *Dunham supra* note 21, at 73. Viewed in this light, the statement by the Court in *Goldblatt* “[t]here is no set formula to determine where regulation ends and taking begins”, would seem to be a refusal to even attempt to formulate a rule as to whether compensation must be paid. 369 U. S. at 594.
25. 294 U. S. 405 (1935).
26. *Dunham, supra* note 21, at 75-76. Even under this test the decision in *Goldblatt* was erroneous because the relationship between the harm and the regulated activity was tenuous at best. The town ordinance is analogous to shooting a horse because one of its shoes is missing.

27. *Griggs v. Allegheny County*, 369 U.S. 84 (1962).
 28. A similar test was applied in *Friberg v. South Side Elevated R. Co.*, 221 Ill. 508, 77 N.E. 920 (1906).
 29. Sax, *Taking and The Police Power*, 74 *Yale L.J.* 36 (1964).
 30. *Id.* at 67.
 31. *Miller v. Schone*, 276 U. S. 272 (1928) was a situation in which the State of Virginia clearly favored the apple industry, which was responsible for the employment of numerous of its citizens, over the cedar trees whose sole function was decorative. Nevertheless, as will be shown below, Sax believes *Miller* was decided correctly.
 32. Sax, *supra* note 29, at 69 (footnotes omitted).
 33. *Id.*
 34. Michelman, *Property, Utility, and Fairness : Comments on the Ethical Foundations of "Just Compensation" Law*, 80 *Harv. L. Rev.* 1165 (1967).
 35. Since the Supreme Court decision in *Berman v. Parker* which equated public purpose, justification for paying compensation is more easily found. This is in spite of the long standing rule that compensation is not a condition of the exercise of police power even when there is a financial loss, as each member of the Community is presumed to be benefitted by that which promotes the general welfare. *Carthage v. Fredrick*, 122 N.Y. 268, 273 (1890).
 36. H. Merillat, *Land and the Constitution in India* 152 (1970).
 37. Navin, *The Concept of "Public Purpose" in Article 31(2) of the Constitution of India*, 6 *J.I.L.* I. 175 (1964)
 38. A. S. Krishna v. State of Madras, A. I. R. 1957 S. C. 297. The Indian constitution-makers purposely decided to excluded the troublesome due process clause from the Indian Constitution on the advice of Justice Frankfurter. See generally Adzin, *Felix Frankfurter—In Memoriam*, 2 *Issael L. Rev.* 299, 307-08 (1967); Douglas, *Bill of Rights, Due Process, and Federalism in India*, 40 *Minn. L. Rev.* 1, 13-14 (1955). See also F. Frank-furter, *Of Law & Other Things That Matter* 128 (1965):

There is no such provision [due process of law] in the Indian Constitution, which was the product of careful study by that very distinguished jurist of Indian, Sir Bengal Rau, who.... [studied] how our [American] scheme of things works, and then recommended against inclusion of such a restriction upon the States of India.
 39. A.K. Gopalan v. Madras, A.I.R. 1950 S.C. 27.
 40. *Diwan Sugar and General Mills v. Union of India*, A.I.R. 1959 S.C. 626; *Express Newspapers v. Union of India*, A.I.R. 1958 S.C. 578; *Bombay Dyeing and Mfg. Co. v. State of Bombay*, A.I.R. 1958 S.C. 328.
 41. Merillat, *supra* note 36, at 155 (footnote omitted).
 42. *Id.* at 156.
 43. A.I.R. 1950 S.C. 27.
 44. *West Bengal v. Subodh Gopal Bose*, A.I.R. 1954 S.C. 92, 101.
 45. A.I.R. 1954 S.C. 119.
 46. Merillat, *supra* note 36, at 160.
 47. A.I.R. 1960 S.C. 1080.2
-

TRIBAL LAWS AND PROCEDURE IN ANDAMAN & NICOBAR

Sankar Prasad Mitra

Chief Justice of West Bengal, Andaman and Nicobar.

The population of the Andaman and Nicobar Islands, according to the Census of 1971, is 15,133 of which about 18,102 persons belong to scheduled tribes. These tribes are aboriginals. They are called (i) Nicobarese, (ii) Onges (iii) Andamanese (iv) Shompens, (v) Jarawars and (vi) Sentinalese. The members of the Jarawars and Sentinalese are not known as they are still hostile to civilised people. In 1971, the population figures for the Nicobarese, the Onges, the Andamanese and the Shompens were 17,974, 112, 24 and 92 respectively. The Nicobarese reside in the Nicobar group of Islands, the Onges reside in the little Andaman Island. The Andamanese have been settled in Strait Island and the Shompens stay in and around Great Nicobar. The tribals of Andaman are descendants of a Negrito race. The Nicobarese and the Shompens belong to the Mongoloid group.

A Circuit Bench of the High Court of Calcutta which has jurisdiction over the Andaman and Nicobar Islands, held its sittings at Port Blair in the second half of February, 1973. The Bench consisted of myself and my learned Brother A. K. De. During our visit in Little Andaman, Car Nicobar, Katchal and Campbell Bay (all in the Southern group of Islands) we came in contact with the Onges, the Nicobarese and the Shompens. We had long discussion with the two Chief Captains and a Vice-Chief Captain of the Nicobarese and the social workers engaged by the Administration to keep in touch with and look after the Onges and Shompens. Apart from our general interest in their manners, custom and ways of living, we were anxious to find out whether these tribal groups follow any customary laws and whether there was any machinery or procedure for enforcement of these customary Laws. The time at our disposal was limited. The statements made to us by the persons interviewed also suffered from inconsistencies, but it was possible to discern the broad outlines of Tribal Laws and Procedure which could be included in this article.

The Onges are nomads who have no sense of private property. The only property they possess is, perhaps, a dog which is inherited, we were told, not by a male issue but by a female issue if both of them existed. The Onges follow scree customs for marriage. The boy and the girl make their own selections. The average marriageable age for a girl is 13 years and that for a boy is 15 years. Before the ceremony takes place they are both supposed to have their hair. Then they take a bath and join a community dance. The marriage usually takes place on a

moonlit night and the bride and the bridegroom sit together before a community fire for the purpose of the ceremony. A hut is constructed for the couple. The boy takes the girl round the hut thrice and then drags her into the hut. It was stated to us that according to some anthropologists the couple go round the hut only once and not thrice. These ceremonies are followed by a community feast, the principal item of food being cooked pork. When a child is born he or she does not belong to the parents but to the entire community. The widows are never remarried ; but childless persons may adopt children for rearing them up. The Onges are only in the food gathering stage and their principal occupation is hunting. Naturally, according to the social worker, there were no other customary laws of this small population which could be traced when, however, a child is born a ceremony is usually held on the 22nd day. The priest is called who perform certain rituals and hands over the child to the father. This is followed by a feast and dance.

The Shompens are also very few in number. They speak in their own language somewhat akin to that of the Nicobarese. They have no personal laws and no properties. It is a nomadic tribe which lives on roots, fish, snails, bananas and other fruits. The only law that they observe is that they do not marry any of their relations however distant that relation may be. The result has been that they are setting gradually extinct. According to the Census figure of 1971 their number is 92; but it is roughly estimated that the total is about 200. Nothing is as yet known as to how they settle their disputes, if any, or punish crimes in their community. They usually live in small villages consisting of two or three small families; but they maintain contacts with other villages nearby. In our presence a plate with a quite few items of cooked food was given to two Shompen boys aged about 19 or 20. One of the boys took the plate and divided up the various items of food into two halves, one meant for each of them. When one of them finished his own half there was just one item left with the other. Immediately he divided it up so that his companion can partake of the last item of the plate. This was a wonderful sight revealing the sense of fellow feeling amongst the Shompens who appeared to be simple folk unaffected by the worries and anxieties, jealousies and rivalries of the civilised communities.

Let us now discuss about the Nicobarese, a fairly advanced tribal community. In Car Nicobar ownership of land by usage and custom is vested in the village chief as his personal property. The village headman keeps the major part of the land for his own family to acquire greater prestige. A person's wealth is judged in the community by the sign of his plantation and the number of pigs that he owns. The village headman grants the right of possession and enjoyment of the rest of the land to various families in the village. The produce of the land granted to a family belongs not to any individual in the family but, to all the members of the family. The headman is the owner of the soil. This system of the Nicobarese strengthens the unity of the family as well as the village and the community. The village headman has powers to sell or exchange lands. There is also a custom that if inhabitants of other islands wish to cut and take away trees, they pay royalties to the village headman. The properties that go by inheritance are coconut trees, canoes and huts. According to the community laws of the Nicobarese, these properties are inherited by all the surviving members of the family. No

individual has any exclusive claim, Males and females have equal rights to properties. After marriage a son may bring his wife to live in his father's family. He may also chance to live with his father-in-law's family. If he goes away to his father-in-law's family, he renounces his claims to the properties of his father's family. The same custom applies to a daughter as well. Each individual has an unspecified but effective right to the produce of land granted to his family.

The produce of the plantation supports every member of the family to which it belonged. If the family becomes extinct, the possession of the land goes back to the Chief who is the owner of the land. The Chief may then either keep it for himself or allot it to other families.

In islands where the Nicobarese are smaller in number the possession of coconut plants, the chief source of wealth, is vested in the headman and his eldest son inherits the property. A daughter inherits only when there is no son. The Nicobarese Headman do not alienate lands to traders lest such alienation should lead to disintegration of the village community.

All marriages amongst the Nicobarese are the courtship marriages. They are not arranged by the parents except, that their formal consent is obtained. As most of the Nicobarese are Christians these marriages mostly take place according to Christian rites. In some of the communities before a marriage takes place, the members of the respective families try to be assured that the couple would live together for the rest of the lives and divorce is neither permitted nor encouraged at all. In other communities divorce is generally prohibited but in cases of adultery, maltreatment or crimes committed by either party, divorce is allowed and the respective couple, go back to their respective families. They are also allowed to re-marry. Boys and girls are supposed to attain their marriageable age when they are 14 or 15.

Adoption is fairly popular. There may be adoptions both of boys and of girls. These adoptions take place in regular ceremonies. Pigs are killed and a feast is held followed by dancing provided that the party can afford it. An adopted son or daughter becomes a member of the family of the adoptive father and enjoys the property of that family.

Generally speaking a person attains majority at the age of 18. In some of the village communities if a father dies, leaving only a minor son, the three Captains of the village, namely the first Headman, the second Headman and the first Headman, may nominate a person to look after him and his family until he attains majority. In some communities the eldest male relations look after the family and when no such relation comes forward the Chief captain nominates a guardian.

The Nicobarese, as we have seen, have practically no personal properties but there may be instances when pigs and different types of moveables may be possessed as personal properties. These personal properties are sometimes disposed of in some of the communities by oral Wills. In the absence of such Wills it was stated to us, these personal properties are inherited in the something or other properties by all the members of the family.

The Nicobarese system of common enjoyment of usufruct of land by all members of the family also contributes to a sense of cordiality amongst the inhabitants of a village as well. For instance we were told that on occasions of festivals, marriages or deaths, the entire village

community takes part and each family makes contributions according to ability. If a person dies, all the families in the village are expected to contribute cloth for covering the dead body and to take part in the funeral rites. The village community subsists on mutual help and co-operation.

Let us now discuss what may be called the procedural laws of the Nicobarese. The Headman of the village, the second and third headmen as well as other heads of families constitute a village council. The Headman and the second and third headman of the "village of an island together constitute the Island Council. One of the most important functions of the village and Island Councils is adjudication of disputes and dispensation of justice. Matters like theft, adultery, illicit sexual offences, use of abusive language, assault and battery, boundary disputes, etc. are all decided by these councils. The Village Council deal with minor matters only but the main disputes and the more serious cases of crimes are passed on to the Island Council. In olden times these village and Island Councils used to give decisions in case of "devil-murder" but the British put a stop to this practice. And these are no longer relevant for our consideration. One of the normal punishments which the Council inflicts is a fine in the shape of pigs and the maximum would be three. The accused gives the pigs to the complainant. In case the accused is not in a position to do so previously some coconut trees were taken from him. But later on it was realised that by the taking away of coconut trees, not only the accused but his whole family suffered. At present if a fine of pigs cannot be realised the Council sometimes excuses the accused and some times calls upon him to give some labour to or do some work for the complainant.

The council also imposes another punishment, namely, that of caning. This punishment is imposed when the offenders are young boys. Caning is done either by the father or head of the family. A sufficient sense of social responsibility has grown amongst the Nicobarese. They execute the punishment of caning without any consideration, it was said, for the relationship with the offenders or any feeling for him. Previously caning was public resorted to for setting an example for others.

The sentence which the Council imposed in criminal cases, it was stated to us were always carried out and there were rare occasions of disobedience. Refusals to abide by the decisions of the Council, are punished by excommunication which causes great economic hardship to the offender in the context of Nicobarese Society. That is why, no offender dares disobey the orders of the Council and accepts and suffers the punishment inflicted on him. It did not appear that there was any conflict between the work of the Council and the work of the ordinary criminal courts, These Councils at present concern themselves with minor crimes. The graver and heinous crimes are invariably brought before the criminal courts. Moreover the Nicobarese have accepted the practice that if the police took cognisance of any crime or complaint, the Council would no longer interfere with the matter. A conviction has also grown that whenever any serious crime is committed, the matter is reported to the police for action under the law. There is also the convention that if any non-Nico-barese is involved in a criminal matter, the Councils never take it up and it is reported to the administrative authorities for necessary action.

Sometimes, however the village headman in these cases tries to effect a compromise, which is ultimately submitted to the ADC for approval.

In Car Nicobar, civil disputes relating to property, according to the Harry Lawrence, Vice-Chief Captain of the Nicobarese, are settled by the village Council on the basis of evidence generally educed be elderly people it the person against whom as decision is given does not abide by that decision, if the dispute is reffered either to the Vice-Chief Captain or the Chief Captain the decision of the Vice-Chref Captain or the Chief Captain is final and binding on the parties. The village Council also settles disputes between a husband and his wife. If the village Council fails to do so, the matter is referred either to the Vice-Chief Captain or to the Chief Captain for a final decision.

The village Council meets where there is a specific job before it. The meeting of the Council is called by ringing a bell made out of junk. The Council usually meets at the residence of the seniormost headman. It also meets in the community house and sometimes at the house of the complaint. The Island Council meets in pucca hali constructed at the village known as big Lapati.

There are no written records of the proceedings of any village Council or Island Council. During our interview in Car Nicobar with Bishop Richards on who is the Chief Captain of Nicobarese and also the spiritual head of the Christians, we explored the possibilities preserving written records of cases that came up before the village council or Island Council and the decisions given in these cases. The Bishop's reaction appeared to be favourable. He said that owing to the large percentage of illiteracy amongst the Nicobarese, no such records could be maintained in the past. But now with the spread of education it may not be difficult to maintain the records.

It is indisputable that the customary and indigenous justice especially of the Nico- barese should be linked up with the modern judicial administration in order that there being two contradictory and parallel system of courts and judicial administration, they may be fused into each other. In other words the modern judicial administration has to be fitted into the customary administration of these tribales, but it is necessary to have a research project not merely to ascertain their customary laws but also to find out exactly what the procedures were. The statements made before us by the Chief-Captains or the Vice-Chief Captain in the different islands suffered from contradictions and inconsistencies and one has to probe deep into the matter over an appreciable length of time to suggest a uniform code of indigenous law and procedure which should apply to the tribal people in these islands. Moreover, apart from the few islands we have visited there are tribes residing in other islands as well and their laws, custom and procedure, would also have to be studied with a view to devetailing them, as far as possible, into our judicial system. We made proposals for a research project to the Andaman Administration and received a favourable responses, A proposal has been sent to the Government of India. Let up hope that concrete steps would be taken in the near future.

TRIAL BY THE PRESS

Sabyasachi Mukherji

Third Year Class

Freedom of the press is a constitutional right given to the citizen of India in Art. 19(1)(a). The fourth estate wields a great influence on people's mind. This influence has given rise to a problem in the legal ethics and the problem is the trial by the press. Trial by the press is a term commonly applied to the familiar practice of the press in reporting and often in commenting prematurely on the details of a trial. The term was originally applied to newspapers. But it can easily be extended to radio, television and other forms of mass communication.

The problem is not entirely a new one. As early as in 1742, the Lord Chancellor of England made a pronouncement on it. Two hundred years later, Justice Jackson of the United States, Supreme Court, found it necessary to write : "But neither counsel nor court can control the admission of evidence if unproven and probably unprovable" "confessions" are put before the jury by news-papers and radio. Rights of the defendant to be confronted by witnesses against him and to cross-examine are thereby circumvented. It is hard to imagine a more prejudicial influence than a press release by an officer of the court charged with the defendant's custody stating he had confessed, and here just such statement-unsworn, unseen, uncross-examined and uncontradicted—was conveyed by the press to the jury.....convictions accompanied by such events do not meet any civilized concept of due process of law."

News-papers, in the enjoyment of their constitutional right, cannot deprive the accused persons of their right to a fair trial. Protection of life and personal liberty is guaranteed in Art. 21, of the constitution of India. The Article reads "No person shall be deprived of life or personal liberty except according to procedure established by law." The sections 53 and 54 of the Indian Evidence Act deal with relevancy of character in evidence. In criminal cases, the fact that the accused is of good character, is relevant, but the fact that he has a bad character is, except in certain specified cases, irrelevant. Evidence of bad character is excluded on the following principle as given by Stephen—"A man's general bad character is a weak reason for believing that he was concerned in any particular criminal transaction, for it is a circumstance common to him and hundreds and thousands of people, whereas the opportunity of committing the crime and facts immediately connected with it are marks which belong to very few, perhaps only one or two persons. "Unfortunately it frequently happens that prospective jurors are

influenced by what has been published in the press about the character and antecedents of a person accused of a crime. This almost invariably happens in criminal cases where the police releases damaging evidence against a suspect at the insistence of news-paper reporters who are driven in turn by an awareness of extreme public interest in the case.

One of the demands of a democratic society is that the public should know what goes on in the court. Public interest in litigation is very intense and the interest in crime is still greater. Crimes are such breaches of law as injure the community. This fact was observed even so early as in the days of the Roman Empire. Roman jurists who had noted this called crimes "delicta publica" and criminal trials "judicia publica". In early Rome all charges of crimes were tried by the whole Roman citizens assembled in Comitia Centuriata. Public trial has become obsolete but crime still continues to be called "public". Its survival is due to the recognition of the unmistakable public mischief which most crimes produce. Hence Burnet, J., replied to a protesting prisoner. "Thou art to be hanged not for having stolen the horse, but in order that other horses may not be stolen."

The public has a right to expect proper information from its public official. But there are too many elements to be considered—such as, importance of the issue, impact on the community etc. For instance, the announcement by a prosecutor that a defendant in a crime, which has shocked the community, will be brought to the court speedily for trial implies that the case is complete and that conviction is fairly certain. Surely it prejudices fair trial. On the other hand, such a statement, in more than one instance, has been used successfully to thwart mob violence. This craving for news hunger often degenerates into sensationalism and there is always a segment of the press which caters to sensationalism for commercial gain. This is a marriage between the worst and most irresponsible elements of two basically responsible and high spirited institutions.

It is often believed that press releases cannot be prevented for public interest even though they may interfere with the fair trial or otherwise prejudice the due administration of justice. But every citizen should be able to satisfy himself as the way in which a public duty is performed. A judgment should be that which the law and evidence demands not what the public may demand.

The two basic rights involved in this question are "freedom of the press" and "a fair and impartial trial". It need hardly be explained that these two basic rights seldom come into conflict with respect to a single individual. It is usually a matter of the right of the public to know versus the individual's right to a fair trial. It can only be solved by a sense of fair play and responsibility on the part of both sides. It must be kept in mind that integrity and impartiality are relative qualities. Absence of high standards of moral and justice can convert trials into circuses and move them from the court-room into the stadium. The Indirect method of publicity is certainly prejudicial. The practice makes a mere mockery of the actual trial and cheapens the public opinion in the integrity and effectiveness of the court.

When the public interest, on the one hand, and the right of an individual to a fair trial,

on the other, come into collision the right of the individual to such a trial should be paramount. This spirit of common law dictates that the parties must have notice for an opportunity to appear and present their cases before an impartial tribunal of competent jurisdiction. It is in the public interest that every person shall have a fair trial unchallenged by outside influences as to the result. England has accepted that the court shall take every action necessary to prevent departure from this fundamental concept. Trial by the press is virtually unknown in England. The public there has long accepted the control of the press by the court in such matters. The English law of contempt of court has been successful in preventing all attempts to prejudice the trial of either civil or criminal cases. Recently, the Podola, case episode created a furore in England. Guenter Fritz Podola, a thirty year old German, was charged with the murder of Defective Sergeant, Raymond Purdy Mr. W.S. Morrison, the Speaker had deprecated discussion by M.P.'s of the conduct of the police in the Podola case.

The speaker said "The man has now been charged. He is, therefore, in the charge of and under the protection of the judiciary. It is for the defence, if they think that any statement made by any one outside this House, whether a member of Parliament or a member of the public, might prejudice the trial of the accused to bring it to the notice of the judiciary who have their own remedy for dealing with this matter." (Statesman, dated 30th July, 1959).

The conflict between the freedom of the press and the right to a fair trial according to the due process of law is not insoluble. Respect for these two indispensable elements of the constitution presents some of the most difficult and delicate problems in the matter of administration of justice. It has taken centuries of struggle to evolve the present judicial system for bringing the guilty to book, protecting the innocent and maintaining the interest of society. But the administration of justice vests in the court.

The 1st amendment of the constitution in 1951 inserted the clause 2 in the Art. 19. The effect of the amendment was that the reasonable restriction of fundamental rights had been accepted on certain grounds. Inter alia contempt of court is one such ground. The new weapon empowers the court to enforce restriction on the irregular and irresponsible pronouncement of the press. Thus the court can steer clear of sensational journalism. It has been held in *Romesh Chandra Thapar* and other cases that the imposition of the pre-censorship was not a reasonable restriction. It naturally follows that the court can come to the rescue of an accused undergoing trial only when the mischief has already been committed against him by a publication in a news paper. A single notification is enough to prejudice the mind of the prospective jury.

Right to fair trial is an antecedent right of an accused impeached of an offence. A remedial right accrues from a breach of an antecedent right. But this remedial right has been denied to the accused who is the victim of the excesses of the press. The court can only give him protection under the garb of contempt of court. The sufferer has no remedy. This is a unique phenomenon and finds little support from the principles of jurisprudence. The court, in respect of such an accused, plays a dual role. It is not only the fountain of justice but the savior also.

The transfer of the remedial right of an accused may be just but it is discretionary while

FOUNDATION OF THE UNIVERSITY LAW COLLEGE

Dr. P. N. Banerjee

M.A., B.L., D.LIT., L.L.D., Bar-at-Law, Vidya-Vachaspati

The first step towards the establishment of what Asutosh described in his famous Convocation Address of 1908 as “the new University of Calcutta”, was taken when under his leadership the Senate of the University decided to establish the University Law College. Law was Asutosh’s first love. The example of Dwarkanath Mitra, senior, who left an imperishable name as Judge of the High Court of Calcutta, inspired Asutosh to the same aspiration. After the passage of the Universities Act of 1904, Asutosh Mookerjee, it is said, was persuaded by Curzon to believe that the Vice-Chancellorship of Calcutta University would come to him after Pedler, if he accepted a seat on the Bench of the Calcutta High Court. In March 1904, Asutosh Mookerjee was appointed a Judge of the Calcutta High Court. He retained his seat on it for twenty years and retired on 2nd January, 1924. For sometime he acted as the Chief Justice of that Court.

Wood’s Education Despatch of 1854 explicitly stated “it would be advisable to establish in connection with the Universities, Professorships in various branches of learning” for acquisition of which facilities then did not exist and added that “the most important of those branches was law.” This, Asutosh stated before a meeting of the Senate on 24 July, 1908, was the position in 1854. For more than half a century the idea of establishing the study of law on a scientific basis was only a dream. The University of Calcutta was founded in 1857; twenty-two years before, in 1835, the Calcutta Medical College had been born. The Civil Engineering College was born in 1856. For five years this college was attached as an appendage to the Presidency College, Calcutta, but it was eventually shifted to its own premises at Sibpur on the Ganges.

In minute written by Asutosh Mookerjee for the Syndicate of the University, he stated :

“The branch of our education system which stands in need of the most urgent and radical reform is that concerned with the teaching of law for our degree examinations. It is a noteworthy fact that we have not got a single college devoted entirely to the study of Law as we have in the cases of Medicine and Engineering.”

The history of the teaching of law in this University has been clearly set out in that minute. When the University was founded in 1857, law classes were attached to the Presidency College. In 1864 the Government decided to attach law classes to the Government colleges at Hooghly,

Dacca, Krishnagar, Berhampore and Patna. In 1869, law classes were added to the colleges at Cuttack and Chittagong. In 1880, such classes were attached to the college at Rajshahi. All these law classes and no independent existence. They were subordinate to the Arts colleges owned and managed by the Government. In 1882, private enterprise attached law classes to private colleges, and the process started with the then Metropolitan Institution; next year the City College followed suit. Asutosh himself was a student of the City College in its law department. In 1885, the then Ripon College was granted affiliation in law by the University. The Bangabasi College, Calcutta, sought and also obtained affiliation in law. Apart from these law classes in the city of Calcutta there were in 1896, six colleges in the districts, affiliated in law. These were the colleges at Cooch-Behar, Bhagalpur, Midnapore, Bankipur, Barisal and Rangoon. In 1908, there were in the University eighteen colleges with affiliation in law. The teachers in most of these colleges were men of distinction. But law students suffered from lack of aim and ideal. The teaching staff was wholly insufficient for the purpose of meeting the requirements of the new regulations. These regulations effected considerable improvement upon the study of law for the law examinations of the University. It was stated in the minute of Asutosh Mookerjee that there was a college affiliated in law in one of the districts where there was only one pupil. That pupil paid a monthly fee of Rupees five only. The teacher who was supposed to lecture on all the subjects of study for the law examinations, was paid his honorarium out of this sum of Rupees five a month. Law libraries did not exist in these colleges.

The Government of the then Bengal as also the then Government of Eastern Bengal and Assam decided to close all law classes attached to the Government colleges in these provinces, and to have instead two law schools, one at Dacca and the second at Patna. In or about 1908, the Bangabasi College intimated to the University its decision to close down the law classes. The City College and the Metropolitan Institution were not anxious to continue their law classes either. The Ripon College alone desired continuance of its classes. The classes attached to private colleges in the districts were all closed down by 1908. Asutosh was anxious to establish a law college in Calcutta like the law colleges in Madras, Bombay and Allahabad. These law colleges were then all owned and managed by the Government. The law college in Calcutta was to be a University Law College. It was to be a model law college and was to be constituted as *bona fide* centre of legal education. Asutosh Mookerjee's minute was in conformity with the principles enunciated by the resolution of the Government of India, of 24 October, 1902. His minute was considered by the Syndicate at their meeting on July 4, 1908, when the following resolution was adopted : "The Syndicate recommended to the Senate that a University Law College be established and the Syndicate be authorised to appoint a provisional committee to organise it." On July 14, 1908, the minute was considered by the Faculty of Law at a special meeting, and the Faculty adopted the following resolution : "That the Faculty do record its opinion that for the promotion of legal education of students for degrees in law, it is desirable to establish a University Law College to serve as a model, but not so as to create a monopoly either general or local." Notwithstanding the fact that legal education was not for nearly half a century placed on a scientific basis, powerful interests and strong traditions were unnecessarily

restless. At a meeting of the Senate held on 21 July, 1908. Asutosh Mookerjee as Vice-Chancellor, moved the adoption of two resolutions. The meeting was very largely attended. Surendranath Banerjee was present at the meeting. It was presided over by Andrew Fraser, the Rector of the University. Under the regulations, the Vice-Chancellor of the University has to maintain the non-partisan character of an impartial Speaker when presiding at a meeting of the Senate. It was expected that a great controversy would ensue, and therefore, the Vice-Chancellor vacated his Chair and the Rector presided. Asutosh Mookerjee moved before the Senate :

“(a) That the University Law College be established and that the Syndicate be authorised to appoint a provisional committee to organise it. (b) That with a view to avoid misconception, it be recorded that in establishing a University Law College the University does not wish to deviate from the principle enunciated in the resolution of the Government of India dated the 24th October, 1902; the College is to be established for the promotion of legal education of students for degrees in law and to serve as a model college and not with a view to create a monopoly either general or local.”

In the course of his speech, Asutosh confidently declared “that law was neither a trade nor a solemn jugglery but a living science in the proper sense of the word.” He pointed out that the Government of the United States of America had prepared a survey of the Condition of the legal education in the different universities of the world. The survey included details about all European countries, America, Japan and China. It contained no reference to India. The Vice-Chancellor stated : “Fortunately” for us, “if the Calcutta University system of law teaching had been described they would have stood branded for all time.” The resolution was carried unanimously. The University Law College started functioning from July, 1909. The Law College was placed under the management of a Governing Body consisting of sixteen members with the Vice-Chancellor as President *ex-officio*. S.C. Bagchi became the first Principal of the College. He was a scholar of eminence and jurist of reputation. In 1912, Birajmohan Majumdar was appointed the first Vice-Principal of the college. The first professors and assistant professors appointed for the Law College were :

Professors : Golapchandra Sarkar Sastri, Haradhan Nag, Harendranath Sen; Assistant Professors : Subodhchandra Ray, Nirmalchandra Sen, Abdullah-al-Mamun Suhrawardy, Jyotiprasad Sarbadhikari, Haraprasad Chatterjee, Asutosh Mookerjee, Birajmohan Majumdar and N.N. Gupta.

The new regulations passed under the Act of 1904 instituted three law examinations, and insisted on a three years' course of study for the B.L. Examination. It prescribed the delivery of regular lectures to students. It made arrangements for holding tutorial classes. The novel feature which was introduced in the curricula of studies was the institution of the system of moot courts. Leading cases were prescribed for examinations in law and these cases were conducted in moot courts under the presidency of the professors of law. The system of holding moot courts is known to England and also to the great schools of law like those attached to the

Universities of Harvard and Yale. Asutosh Mookerjee himself presided over many of the moot courts and he also used to deliver lectures to the students.

The University Law College was first housed, as stated before, in a tiled hut in the compound of the University of today. The Law College had no finance excepting the revenues derived from the students. In 1909 the number of students studying in the college was 520. It, however, was fortunate in receiving from the Government of Bengal an annual sum of Rs. 3,500 for five years. It was still more fortunate in securing from the Government of India, the annual sub-vention of Rs. 20,000 which was subsequently raised to Rs. 30,000. Private enterprise came also to the aid of the Law College. Maharaja Manindrachandra Nandi of Cossimbazar not only agreed to the abolition of the law department from the Krishnath College, Berhampore, but also placed at the disposal of the University Law College the sum of Rs. 50,000 for the purpose of founding a number of scholarships for students of law at a competitive examination to be held by the college, with one condition that in cases of equal competence preference might be given to those who had graduated from the Krishnath College, Berhampore. Maharaja Prodyotcoomar Tagore made a gift to the college the sum of Rs. 10,000 towards the founding of a law library in connection with the Law College to be called after his father, Maharaja Jatindramohan Tagore. The only condition of the gift was that a life-size bronze bust of his late father Jatindramohan Tagore presented by him should be installed in the Law College Library. Jatindramohan Tagore was President of the Faculty of Arts in this University in 1881. His bronze statue decorates the library hall of the University Law College. Prodyotcoomar Tagore also presented to the college the entire library of valuable law books left by his grand-uncle Prosunno Coomar Tagore. Gooroodas Banerjee felt exultant when the Senate accepted the gift of two other great lawyers to this University—Taraknath Palit and Rashbehary Ghose. He invoked the aid of “Themis of law and wealth.” The debt of the University of Calcutta to what Asutosh described as “the dreaded and the despised tribe of lawyers” is indeed very impressive. Private enterprise again came to the assistance of research in law in this University. Onauthnauth Dev, one of the landed aristocrats of the city, made a gift in 1912 of Rupees 25,000 for the foundation of a research prize. The recipients of the prize have considerably expanded the bounds of the knowledge of law in this University. The list of reasearchers includes distinguished names like those of Atulchandra Gupta and Bijankumar Mukherjee. Both of them were professors in the University Law College for years. The former is regarded as a well known scholar and advocate in Bengal; the latter sat as a Judge of the Calcutta High Court for years and then occupied the exalted position of a Judge of the Supreme Court of India under the new Constitution and rose to be its Chief Justice.

From out of the revenues of the University Law College another lectureship for research in law was established in 1925 to commemorate the memory of Asutosh Mookerjee. It is called “the Asutosh Mookerjee Lectureship in Law.” S.C. Bagchi, Principal of the University Law College, was the first lecturer. For more than thirty years no other lecturer has been appointed, and the funds originally contributed amounting to Rs. 20,000 (present value Rs. 68,700) are lying invested so that the interest on the accumulation might maintain a Chair in law.

As stated before, the University Law College was housed in the Darbhanga Library Building. Accommodation for the students of the Law College was, however, found in the hostel adjoining this building. In 1909 the Government of India made a grant of rupees six lakhs to the University for the construction of hostels for the students of colleges affiliated to the University. The request of the Syndicate to grant a sum of rupees one lakh for the construction of a hostel for the students of the University Law College out of this grant, was not complied with by that Government. In 1912, the University acquired a plot of land south of the Darbhanga Library Building, at a cost of rupees one lakh and fifty thousand, paid out of its reserve funds. The total approximate cost of the hostel for law students was four lakhs of rupees. The Government of India contributed three lakhs of rupees towards the cost. The gift of the Government was for the purpose of having a hostel for the Hindu students of the University Law College and also for the erection of an examination hall for holding University examinations. The Syndicate contemplated that the building when completed would accommodate the Registrar and two professors of the University Law College who would be in charge of the students. This purpose could not be effected due to lack of funds. The five-storeyed building standing on the Colootollah Street is called the University Law College Hardinge Hindu Hostel after the name of the then Chancellor of the University.

The services of the University Law College to the University and the country are not always realized. It is estimated that it contributed in diverse ways, to the University from 1909, the date of its foundation to 1956, the sum of Rs. 6,23,286-8-10. The sum of Rs. 20,000 out of the Rs. 30,000, the annual grant made by the Government of India to the University Law College has not since 1934-35 been spent by the University on the Law College, but is spent by the University itself. The University Law College has been, during the course of its existence for nearly half a century, the nursery of leaders of the bar and the judiciary of these provinces including the High Courts. This college has given to India its first President, Rajendra Prasad, who was at one time a professor of the University Law College. It has given to India two Chief Justices of the Supreme Court of India, Bijankumar Mukherjee and Sudhiranjan Das. Both of them were once professors of the University Law College. One of the members of the teaching staff, Pramatha Chaudhuri, became the leader of a new movement in Bengali literature. Prabhatkumar Mukhopadhyaya, another teacher, was a reputed short story writer and novelist.

RASH BEHARI GHOSH

Sitaram Banerjee

Advocate

My young friends, you have failed in your duty. You have been conducting a Law College Magazine for some time but you have nowhere mentioned Rash Behari in it. My surprise at the omission (unconscious though it be) equals that of Napoleon the Great who observed in great surprise to Laplace, after reading his memorable work 'Mechanique Celeste', "Monseieur, you have written a treatise on the heavens but you have nowhere mentioned God in it." But I forget. To you, perhaps he is only a name—to us he is still an institution, an inspiration—a great tradition—a magnificent spirit hovering over the entire precincts of the High Court.

Rash Behari Ghosh—what a hoard of memories the name conjures up. The majestic form—the keen and masterful gaze—the deep bass voice seem still to fill every court-room. His was a presence that one could feel by instinct, as it were. One could always single him out in an assembly of a thousand distinguished men.

You, of course, have heard of him as a great lawyer but perhaps what you do not know is that he was the greatest lawyer of his age. And what an age that was! It was an age of stalwarts such as Sir Charles Paul, Woodroffe, Sreenath Das, Lalmohan Doss, Sinha, Dr. Ashutosh and a host of other stalwarts. That, probably, was the golden age of the Calcutta High Court. But Rash Behari was more than a mere lawyer. You will find in the peroration of his Tagore Law Lectures a quotation "He knoweth not law who knoweth not the science thereof." He knew the science of law. He not merely knew the science of law but he knew also how to apply it in the practice of law. His argument before the court was not strutting out a head-roll of cases—his was an exposition of the principles of law. He would scorn to refer to a precedent unless it conformed to the right principle of law. You must not understand me, however, to say that in arguing a case he would not present anything but correct law before the judges. It is not possible for any advocate to do that and what is more, it is not the duty of an advocate to do that. It is said of Dr. Rash Behari and I believe, quite rightly said, that no one was responsible for more bad laws than him. His presentation of the principles of law was so impressive and supported by such cogent reasons that the judges were forced as it were, to accept that as correct law. No greater compliment can indeed be accorded to an advocate: Once he was arguing an intricate question relating to the law of mortgage before a very eminent

judge and the judge was getting a bit puzzled till he referred to Ghosh's book on mortgage where a diametrically opposite opinion was expressed by the learned doctor himself. On being confronted with these passages from his own book Dr. Ghosh replied : "Ah my lord, then I was expressing my views as an author, now I am advocating my client's cause."

Indeed, a great advocate is he who can, for the time being, identify himself with his client's cause and can present his case with utmost sincerity and honesty and in the best of possible lights. Added to this masterly exposition of law, he had a wonderful mastery of details. From personal knowledge I can assert that he knew more of the records of a law than even most of his juniors. It has been asserted, and I must confess asserted with some degree of truth, that it was a torture to have to work with him as his junior. The reason, however, is manifest. He demanded a high standard and it was not possible for all to come up to that standard. But even if it was torture to have to work with him it was one of the greatest intellectual pleasures of one's life. How thoroughly one might have prepared his brief, how thoroughly one might have mastered the law applicable to the case one might be sure of getting something new from Sir Rash Behari. He would throw some light upon the case which did not and could not strike any one appearing with him. His was the genuine gold of genius and that marked him out as the towering personality amongst his colleagues. He was the one man who could "make" and "unmake" laws and this is why his opinion was eagerly sought for and always at enormous expense on knotty problems of law throughout the length and the breadth of the whole country. Even while up at the Simla Hills during the long vacation his time was fully occupied. I have seen most distinguished lawyers from Bombay and Madras, from Allahabad and Lahore coming to consult him in his beautiful home at Grass mere and obtain his opinion on important cases. I am not aware that any other lawyer in India had or has achieved this distinction yet.

With the towering genius and commanding personality a robust independence of spirit followed as a logical and psychological sequence. He did not care for adventitious honours or distinction but they came to him as a matter of course. When the late Sir Lawrence Jenkins, one of his greatest personal friends offered to make him an advocate (we were all Vakils then) entitled to practise on the original side of the Court *honoris cause* he firmly refused the offer. He wanted it not as a matter of privilege but as a matter of right. He wanted it not for himself alone but for every member of the Vakil Bar of which he was the brightest jewel and ornament. I heard it from a most reliable source that Rash Behari never cared to call upon the Viceroy although he used to spend his long vacations at the Summer Capital of India. His spirited and dignified reply to Lord Curzon's infamous Convocation Speech has become a matter of history and we shall ever remember it with pride and pleasure. His famous speech from his seat in the Imperial Legislative Council against the passage of the notorious Press Act in Lord Curzon's time marked him out as one of the most fearless critics of a bureaucratic Government and one of the doughtiest fighters for the cause of freedom. This independence of character manifested itself in every walk and sphere of his life. It is this independence which earned him the appellation of the 'lion of the Vakil Bar' and a lion indeed he was. You must have

all heard of his reputation as the most fearless and independent advocate of his day but I am sure, one is not in a position to truly appreciate the measure of that fearlessness and independence unless one had actually seen him and worked with him. Some of his rejoinders to the judges and to the counsels on the other side have become classical. Delivered in his inimitable style and with that biting sarcasm of which he was a pastmaster, it was a joy to hear them although one happened to be the target himself—for his sarcasm was like a keen Damascus blade which cut but left a clean wound behind. His sturdy independence as an advocate was of course, in a great measure, due not merely to the fact that he was the most learned advocate of his day but to the fact that he knew that he was the most learned one. It was this self-confidence and self-consciousness which might have marred a lesser man made him what he was, for this self-confidence in him was what he merited and what became him well. The position that he occupied at the bar in his later days was indeed a unique one. Most of the judges (barring of course the civilian judges) were his personal friends or colleagues (mostly his juniors) at the bar and more than one, indeed, were his own pupils and his occasional references before those judges such as “your Lordship remembers that case in which your Lordship rendered me such valuable assistance as my junior” or “in that case, your Lordship was opposed to me and I had pleasure of winning that case” were very keenly appreciated by the judges themselves and I have no doubt that they felt honoured by such personal and intimate reference. I am not a post-wat *nil admirari* type but I do say this that I have never met nor am I likely to meet an advocate of Rash Behari’s type. He was a class by himself and that class came into existence with him and died with him. His Alipur residence was named “Sans Souci” and his letterhead bore the motto “Flecti, non Frangi” which exactly typified his character.

No character-sketch of the man, however, will be complete without a reference to the kindness and generosity of his spirit. Some of his critics have characterised him as a misanthrope but believe me when I say that no greater lie was ever spoken. His princely benefactions in the cause of education give a lie direct to any such aspersion. True it is that he was not approachable by all and sundry, true it is that he did not wear his heart on his sleeve (to use a somewhat vulgar but expressive expression) but once approached his heart would bleed at human suffering and poverty. His purse-strings were immediately unloosened and unstintedly unloosened on the occasions of those natural calamities such as flood and famine which have come to abide in this unfortunate country of ours. And his charity, remember this, transcended the boundaries of his own province or even of his own country—indeed his heart was cosmopolitan. But this cosmopolitanism did not stand in the way of his nationalism—for an ardent and rare type of nationalist he was but there was nothing chauvinistic about his nationalism. Not an impatient idealist by nature or by training—his idealism was of the type which did not ignore the realities of his surroundings. His private charities were indeed many and great.

Such, my young friends, was the man who led the Vakil Bar during the first quarter of

this century and who infused a sense of self-respect and self-confidence in that body. Such was the man who was the undoubted leader of the sober and responsible public opinion of his day and who stood as a mighty bulwark against bureaucratic in-roads upon public and private rights. To know the man was an education in itself—to come in contact with him was a privilege of which we were all proud. He was the man who removed the inferiority complex from which the Indian Bar had suffered long and he it was, who demonstrated that one could be the greatest of lawyers and advocates without crossing the seas. I sympathise with you, my friends, that you have not been privileged to come in touch with that master mind but keep his ideal before your mind's eye and believe me when I say that you can not go for wrong if you do that.

THE PATRIARCHAL THEORY OF THE ORIGIN OF THE STATE

Jagadis Chakravarti

M.A., B.L.—Ex-student

The Patriarchal theory owes its origin to Sir Henry Maine. The theory was first propounded in Maine's "Ancient Law." From the study of Comparative Jurisprudence and specially from the study of Roman Law he defined it as the theory of origin of society in separate families held together by the authority and protection of the valid male ascendant. The chief characteristic of the patriarchal families is that the eldest male of the oldest line is absolutely supreme in his own household exercising the power of life and death over his slaves and even over his wife and children. The evidence in favour of the patriarchal theory is thus summarised by Maine :—

'The Ancient Law uniformly conceives society as a collection of families and not of individuals. The scriptural example of Jacob and Easu as also the examples of the ancient Greek and Roman families suggest the inference that primitive communities were expansions of families which held together instead of separating at the death of its patriarchal chieftain. All evidences of the past bear out the fact that the elementary group is the family, connected by the common subjection to the highest male ascendant. The aggregation of families forms the "gens" or house. The aggregation of houses makes the tribe, the aggregation of tribes constitutes the commonwealth or the state. The phenomenon naturally suggests a series of concentric circles gradually expanding from the same point, i.e., the family.

Although the oldest Roman Law shows that the family broke up after the father's death, it leads us to infer a still earlier stage when the family held together after the death of the father and was collectively transferred to the heir. But the Roman law of Twelve Tables extends the right of inheritance beyond the limit of the family to the members of the "gens" and clans to which the deceased belonged. This leads us to a very important modification of Maine's Conception of primitive society as an aggregation of families. Indeed, the bonds of union within the "gens" were so strong that primitive society should properly be regarded as an aggregation of "gens" rather than of families. Maine meets these difficulties by saying that such a "gens" is nothing but a fictitious extension of the family. As a matter of fact, however, Maine's defence is only half-hearted and unconvincing. He scents a greater danger.

At a later date (1870) when McLenan and Morgan basing their accounts upon the

observation of savage societies in Australia, Africa and America rejected the patriarchal theory altogether and substituted a Matriarchal theory in its stead, the anxiety of Sir Henry knew no bounds. McLennan and Morgan stated that human society started with promiscuous relationship of the sexes and it was only by means of constant regulation of sex relations that family afterwards came into existence.

In the face of the above criticisms, Maine was compelled to modify his patriarchal theory as embodied in his "Ancient Law," and in his later work "Early Laws and Customs," he stated the theory in a revised form. "Neither the patriarchal theory," he declared, "nor the counter theory was sufficient to explain the origin of all societies. Many savage societies in Egypt still show too little traces of patriarchalism. On the other hand, promiscuity would naturally tend towards infecundity which among savages involves weakness and eventual degeneration. Moreover, the matriarchal theory assumes that sexual jealousy, one of the strongest of human passion, was in abeyance for a long time. Finally, the analogy of the higher type of mammals shows that the primitive men most probably lived in small communities, each with a single wife or several wives whom he jealously guarded against all others." Hence Maine concludes that the patriarchal theory may still be correctly regarded to explain the primitive groupings of mankind. Indeed, he fixes upon power through sexual jealousy as the formative cause of primitive society.

The theory enunciated above appearing in "Early Laws and Customs" is different from that embodied in Maine's earlier work "Ancient Law." An essential characteristic of the patriarchal theory in "Ancient Law" is that the patriarch—the oldest living male ascendant is supposed to bear despotic sway over his grown up sons as well as over the women and young children of his household, and the "implicit obedience of rude men to their parent" which this conception involves is spoken of as a "primary fact." But it is difficult to suppose this to be a "primary fact" in the patriarchal family that Maine presents us in his "Early Laws and Customs." Of this family he says that it is "more than barbarous and is extremely savage that "sexual jealousy, indulged through powers, might serve as a definition of it"—"the power of the strong man is the principal cause of it." But in such a group based on sexual jealousy and physical force, what motive is there to make the grown up son, in full youthful vigour, submit to the despotic authority of the father? Maine suggests that it is the respect for the paternal wisdom and says that "the strongest and the wisest man rules." But we have the high authority of Prof. Sidgwick on our side who says that strong animal passion often transcends the respect for paternal wisdom and our knowledge of monkey's and other animals supports our contention. Sidgwick further points out that even when the patriarchal family was established within the clan, there is no reason to regard the father's power as the original type of political power. Examples are not lacking where we find the principle of election on the ground of personal efficiency combining with the principle of inheritance in the male line to determine chieftainship.

The conclusion that emerges from the above consideration is that under the influence

of the study of savage life to which Mclenan and Darwin led him, Maine has been compelled to modify his theory to a considerable extent. In his attempt to adapt the theory to actual conditions of human society Maine has weakened his original position but has gained nothing thereby. His theory, in whatever form be it put, cannot go to the root of the matter, viz., the origin of civil society. Historical evidence is lacking to show that the patriarchal or the matriarchal family was the social unit which developed into a state. Such types of family might have been the origin from which particular state might have evolved, but they were by no means universally present. Mr. Willoughby disputes the very idea that a state can evolve out of a family. He says, "the two institutions are different in essence. In the family the location of authority is natural (i.e., the father). In the state it is one of choice. Subordination is the principle of the family; equality that of the state. So dissimilar are the aims of the two institutions that one could not have owed its origin to the other. The family never was, and can never become a subject of public law; its interests are necessarily private."

UNIVERSITY LAW COLLEGE MAGAZINE

Dr. Pratap Chandra Chandra

EDITORIAL

About a decade ago our illustrious Principal, Dr. P. N. Banerjee expressed in the pages of this magazine, his great hope that the day was not far off when this magazine will attain the high standard of the Harvard Law Review. In voicing this aspiration of all of us, he definitely laid down the lofty ideal—the high goal to aim at—for all succeeding compilers of this magazine. It has been those blessed words—that worthy ideal—of our Principal that have inspired us in our task.

We can say at least this much that we have tried our utmost in our humble way to fulfil this task. We have tried to add a review of our own to each article. We have also endeavoured to make the magazine truly representative of the views of the students of this College. In doing all this how far we have been able to make our work an approximation to the above ideal, it is for our generous readers to decide.

IN REMEMBRANCE

Marshall Stalin is dead. In his death the world has become a distinctly poorer place to live in. He was not only the greatest leader of the October Revolution and of the great Russian people, he was also the greatest champion of the cause of the lowly and the poor, wherever they are, and one of the most farsighted statesmen of all times. If doing the greatest good of the greatest number is the measure of true nobility, he was the noblest governmental leader of our times. Moreover, as our Prime Minister Sri Nehru said, he was a man who exposed the cause of world peace and firmly hated all wars.

We bow down our heads in deepest respect before the memory of this great leader.

Another great captain has fallen.

The tragic end of Dr. Syamaprasad Mukherjee in detention at Srinagar has been a great shock to us. In his death the country has lost a great statesman and one of its greatest educationists. Indeed the detention of a leader of so strong and magnetic a personality and detention far away from his homeland and, above all, detention without trial, are all great

departures not only from the usual rights conferred in our constitution but also from the underlying principles of a free nation.

To us he was not only a politician. He had close connections with our beloved *Alma Mater* and with this college of ours. He was an outstanding student of this institution and afterwards he became one of its most distinguished teachers. We silently pay our great respect and homage to the departed soul. We also offer our condolences to the bereaved family.

**

**

**

We have lost another great thinker—Dr. M. N. Roy. Led by the burning fire of revolution within him, this great son of Bengal organised in Mexico, in the beginning of this century, some of the first Communist revolutions of our times. Since then he had taken active part in almost all the major revolutions of the world.

He was one of the most scholarly and stimulating writers of modern India. In his turbulent life he was a great general. In death may his soul rest in peace.

**

**

**

In the past year we have also lost Prof. H. L. Chakrabarti, Prof. K. K. Basu, and Prof. Ajoy Ch. Dutta. While all of them were Professors of our college some time or other, Mr. Dutta was also the President of our Union from 1933-35.

Through this column we pay our respects to the departed souls.

MATTERS CONCERNING US

Change of syllabus

As regards the teaching of law in our college we have certain important points to make.

At the outset we must complain about our present syllabus. Proposals for appropriate changes in our syllabus have been in the air for quite a long time. But unfortunately as yet they have come to nothing. It has been the considered opinion of a vast majority of the students and also of many of our professors that, in the course for Preliminary Examination, Roman law and the Lex Aquilia ought to be replaced by some other subject which will be less antiquated and more useful to law-students of to-day. Elements of Company law or the Mohamedan Law, which is now in the Intermediate course, may well fill up this gap. Again, in the course for Intermediate Examination, the study of the English Law of Real Property is equally useless. In its stead the Law of Trusts may be introduced here instead of in the third year, and the Law relating to Property, may also fill up the gap left by Mohamedan Law. This will considerably lighten the course for the Final Examination, in which important legislations of recent times like the Press Act and the Estate Duty Act may be introduced most profitably.

In short, we would earnestly request our authorities to revise our present syllabus in the light of the presentday needs of a student of law who intends to enter the legal profession.

LL. M. Couse

As regards LL. M. course we suggest that a few classes should be introduced for students appearing in this examination. This would encourage more students to go in for this course.

Tagore Law Lectures

Furthermore, although there is a provision for the holding of an examination amongst our students on the subject of the Tagore Law Lecture delivered each year, no such examinations have been held for about a decade. We submit that the authorities should start holding this examination as soon as possible.

Moreover, at present Tagore Law Lectures are delivered 5 years behind the corresponding academic year. This anomalous position should be progressively rectified by holding more than one Tagore law lecture annually for a few years.

The University must also arrange for prompt publication of the Tagore Law lecture delivered each year.

Research Works

"India lacks academic lawyers", observes the Chief Justice of the Calcutta High Court. "The very few research works so far published", continues the Chief Justice, "had been of the most rudimentary character." While we fully appreciate the observation, it will not be just out of place to try to find out the cause of the situation.

At present there is no incentive for lawyers to take up serious research work. The greatest honour that the Faculty of Law can offer is a 'Tagore Law lectureship.' In the Western countries 'chairs' are maintained for the academic lawyers. No such arrangement has yet been made in this country so that intending workers may be relieved of monetary difficulties and may engage wholeheartedly in research work.

This is possibly one of the main reasons why inspite of her having eminent lawyers in the bar and the bench, India has not produced recently even one Holland, Maine or Roscoe Pound.

It is only when such 'chairs' are established that systematic study and research works under eminent lawyers on different branches of legal system become possible.

Shifting of Law College

A sparrow has been whispering for a long time that our Law College is going to be shifted to some more suitable place. But we have not yet heard of any concrete proposal, though rumour has it that it will be shifted to some northern suburb of Calcutta. While we fully appreciate the environmental advantages of any such change of seat, we also think that the authorities must keep in mind the convenience of the students in their journey to and from such a place.

LAWYERS' ROLE

At the eleventh session of the Bengal and Assam Lawyers' Conference held at Midnapore and the ninth session of the U. P. Lawyers' Conference held at Benaras on December 25, 1953,

some points on the role of Lawyers in new India were discussed. At Midnapore it was observed that "...the Lawyer of the present day does not hold the great place that he held in public life in the past", while Benaras Conference resolved that "...now he (the lawyer) sometime appears as an *impediment in the path of Progress*".

Obviously we are inclined to form a gloomy picture of the future. But even then we cannot support these observations. Lawyers played a conspicuous part in the struggle for independence and there is no reason why they should be out of place if today they can proceed with the progress of society. Moreover, the most important function of the lawyer is to reconcile the legal system to the changing structure of the society. This is no easy task and by performing this task lawyers help in social progress. So we fail to understand how at this transitional period lawyers can be regarded as impediments in the path of progress. As no less a person than Sri P. B. Chakraborti, Chief Justice of the Calcutta High Court, says—"If eternal vigilance is the price of liberty, there must be some one to keep the vigil. It is on the lawyers that sleepless task has fallen."

Law Courts in New China

Reference may be made here to the functions of lawyers of New China where new laws have been adopted to suit the changed conditions. The authorities there, being approached for information regarding the recent changes in the legal system, informed us that "...the law-making can come from either the people themselves or from an oligarchy. In the former case—it is a matter of gradual evolution and would therefore take time. ...Our system is still in the making. ...We have...special people engaged in legal work...".

In the hands of these people, the judicial system of New China has undergone revolutionary changes.

One of the new features of the courts is the system of People's Assessors, instituted in accordance with the Governments' Provincial Regulations on the organisation of People's Courts. Any popular organisation may be asked to choose one or two persons who sit as assessors in a given case. So a distinctive characteristic of the New Law Courts of China is their close association with the people.

Another feature of the new system provides for travelling judges who try cases on the spot. A series of circuit courts have been established. This has made justice inexpensive and prompt in New China. And the courts now use every channel to assist the people to grasp both the letter and the spirit of the law.

Thus, in that country the importance of the role of lawyers is so much appreciated that they are now regarded as "Defenders of Peoples' Rights" and are engaged by the state to work for the people. There the lawyers have played an important role and have helped to clear up the path of progress to usher in the new era.

Re-orientation of World Law

On 28th December, 1953, an International Conference of eminent jurists and constitutional

experts of 25 countries to consider the reform of International Law and revision of the U. N. Charter was held in the Central Hall of Parliament House, New Delhi. The Conference was presided over by the then Chief Justice of India, Sri Patanjali Sastri.

The Conference—first of its kind held on Asian soil—was organised by the Indian Branch of the International Law Association formed over 80 years ago in Brussels. The value of such a Conference at the present moment can hardly be ever-estimated. Reorientation of International Laws is a great necessity to-day.

Democratic Lawyers' Movement

The West Bengal Democratic Lawyers' Association has been formed as the State counterpart of the International Association of Democratic Lawyers of which Mr. D. N. Pritt, Q.C. is the president. Elsewhere in this magazine, the secretary of the said association has presented to us the aims and objects of the movement of Democratic Lawyers. We wish all success to the organisation and hope that it will keep up its high ideals.

RECENT LAW REFORMS

Criminal Law

Coming to matters of national importance, the draft memorandum of the Union Home Ministry embodying proposals for judicial reforms deserve serious study. The pro-proposals centre on three important aspects of the system namely, reduction in the cost of litigation, removal of law's delay and, finally, establishment of judicial panchayats in the rural areas. For achieving the first object court fees and lawyers' fees etc., are sought to be reduced. This step will have the support of every right thinking person. But the other steps contemplated in the draft proposal e.g. restricting rights of appeal in certain cases, establishing judicial panchayats in village areas, are not equally harmless. The extremely serious implications of these sweeping steps have been made clear by Mr. Ajit Dutt, Advocate, in his article in this magazine. We earnestly request our administrators to think coolly and to take every aspect of such reforms under consideration before rushing through them.

Estate Duty Act, 1953—

Another piece of revolutionary legislation has been the Estate Duty Act, 1953. This Act came into force from October 15, 1953. If we recall that it was in 1925 that the then Taxation Enquiry Committee suggested the advisability of such a legislation, we cannot but say that the Act makes a rather delayed appearance in the Statute book.

Though it is difficult to comment on the Estate Duty Act before we have witnessed a few years of its working, yet we may point out that the rates of the duty might and, ought to have been more steeply progressive and the provisions against evasion far more strict.

West Bengal Estate Acquisition Bill—

Another unusually delayed legal reform has been the passage of the West Bengal Estate Acquisition Bill. Most other states of the Indian Union have run ahead with their programmes

for Zemindary abolition. West Bengal is, however, just making her start. However, we hope that the State Government will speedily go ahead with the implementation of the provisions of this admittedly inadequate Act.

Company Law Amendment—

On the 2nd September, 1953, the Finance Minister introduced in the House of the People a Bill to consolidate and amend the law relating to Joint Stock Companies in India.

The bill contains more than double the number of sections of the present Act and seeks to make some drastic changes in Company affairs. We reserve our comments on the bill for the present.

Income-Tax (Amendment) Act, 1953—

The comprehensive Bill introduced in 1951 with a view to give effect to the recommendations of the Income-Tax Investigation Commission, has, at long last, come out in the form of Income-Tax (Amendment) Act, 1953. It is claimed that the Amendment Act confines itself to non-controversial matters, such as benefits to assesses, procedural provisions, prevention of evasion etc.

It is an axiomatic truth that most comprehensive measures should be introduced before we can expect income-tax law to be perfect. The enactment of the Amendment Act is not to be taken as an answer to that truth.

University Act, 1951

At last the above act has come into force. So long the University was governed by the Act of 1904 which was described by the Radhakrishnan Commission as most undemocratic. Though in the act the due rights of Affiliated Colleges and ordinary graduates have been overlooked to some extent, it is expected that this new act will usher in a new era in the University affairs.

JUDGMENT OF ONE MAN COMMISSION

The report of the Commission of enquiry into the allegations of assault by the police on Pressmen on July 22, 1953, when they had assembled in the Maidan to discharge their normal duties, will give rise to much controversy. While the police have been absolved of all charges, Press reporters were found guilty of criminal offence under Section 186 I.P.C. and of breach of an order under Section 144-Cr. P.C.

It is contended that an "honest and independent Press is one of the "bulwarks of liberty". It is for the future to reveal whether the above report does not go against the cause of liberty.

LAW & LIBERTY

It is often argued that the present regime is conspicuously marked by the absence of civil liberties. The Executive is an oracle to the Legislature and the Legislature is the rope-dancer on the stage of the Executive. The result is that we have a Government not of laws but of men—a regime where rule of law has been sacrificed to the rule of power.

In support of these views the statutes like Preventive Detention Act, Security Act, Maintenance of Public Order Act, Press Acts etc. passed in the different legislatures of India and affecting the civil liberties of the people are referred to.

Now our observation is that powers conferred by these statutes on the Government are often misused and this drives public opinion against such statutes. We know that law is nothing but 'justice speaking to men through the voice of the State.' But when public opinion goes against it, there must be some defect in the law itself or in its application. In either case the Government is exposed to great risks and can continue to enforce such laws only at its peril. And it is the task of lawyers to come forward and point out where the defect lies and how it can be removed.

EVENTS OUTSIDE

The year under review has been mixed with the prospect of peace and war. There are only a few bright lights on political horizon of the world. Events in Korea have taken a new shape. Undoubtedly India undertook a great responsibility in accepting the chairmanship of the Neutral Nation Reparation Commission. But the attitude of the South Koreans towards Indian Army personnel had been at once painful and detrimental to the promotion of peace in that unquiet and war-torn land. We ardently hope that the world to-day will not succumb to another world war, particularly when all of us know that another such war will be destructive beyond imagination.

British Guiana and Kenya

The recent happenings in British Guiana and Kenya demand more than a passing notice. Both on the issue of British Guiana and that of Kenya, the British Government has been guilty of violating Article 73, Chap. XI of the U. N. Charter. Under these circumstances India is quite competent to bring the "dispute" or the "situation" to the attention of the Security Council or of the General Assembly as enjoined in Article 35 of the U. N. Charter. We think it is India's duty to do so.

PAK—U.S. MILITARY PACT

As Prime Minister Nehru has so ably pointed out, this Pact will have the most serious repercussions on Indo-Pakistan relationship and is directly antagonistic to the sentiments of all Asian peoples. Prime Minister Mohamad Ali of Pakistan has said to the press that the American Military help will make it easier for his country to solve the Kashmir problem. This clearly reveals the *raison de etat* of Pakistan's eager acceptance of American arms aid. In this connection the American attempt to revive large scale semi-colonialism in Asia is clearly discernible. We are resolved that the days of Mian colonialism are over forever.

India's devotion to peace and her opposition to colonialism and imperialism of all sorts is not new. Besides, the years succeeding Sarajevo have clearly demonstrated the utter futility of wars and preparations for "wars to end wars", and the sooner nations realize the significance of this in this 'atomic' age the better will they subserve their ultimate interests.

OUR FELICITATIONS

We offer our felicitation to Sri Mehr Chand Mahajan on his appointment as the Chief Justice of India. On our onward journey we have received a message from him which will be an inspiration not only to us but also to our successors ever afterwards.

We also felicitate Dr. J. C. Ghosh on his appointment as our Vice-Chancellor and assure him of our whole-hearted support.

We congratulate Sri Sadhan Chandra Gupta, a distinguished ex-student of our college, for his election to the House of the People. Inspired by lofty ideals, he will assuredly serve the people whom he represents.

To Mr. D. N. Pritt, Q. C. and Dr. Roscoe Pound, who made time amidst their manifold activities to contribute articles to our magazine, we pay our deepest regards.

Our heartfelt thanks are also due to Hon'ble Mr. Justice D. N. Sinha, Prof. Hiren Mukherjee, Sri Ajit Dutta, Sri Sadhan Chandra Gupta, Sri B. C. Sen and Sri A. P. Chatterjee for their kind contributions to our magazine.

FOR OUR SUCCESSORS

The following persons could not contribute articles to this issue of our magazine. Most of them, however, have promised to contribute to any future issue. We take this opportunity to express our heartfelt thanks to all of them.

Mr. Rajani Palme Dutta — U.K.

Prof. G. W. Patton, Vice-Chancellor, Melbourne University.

Mr. Mullunajagam, Principal, Ceylon Law College.

Mr. Lalita Rajapakse, LL. D Minister of Justice, Ceylon.

Mr. Chen-Hau-Sing, Vice-Chairman, Editorial Board, China Reconstructs, Peking.

Dr. Rajendra Prasad, President, Indian Union.

Dr. S. Radhakrishnan, Vice-President, Indian Union.

Sri C. C. Biswas — Law Minister, Govt. of India.

Sri Mehr Chand Mahajan, Chief Justice of India.

Sri Pantanjali Sastri—Ex-Chief Justice of India.

Sri S. R. Das, Judge, Supreme Court.

Sri Bijan K. Mukherjee, Judge, Supreme Court.

Sri P. B. Chakravarti, Chief Justice, Calcutta High Court.

Mr. Fazal Ali, Governor of Orissa.

Mr. S. M. Jaffar Imam, Acting Chief Justice, Patna High Court.

Mr. M. C. Chagla, Chief Justice, Bombay High Court.

Sri N. C. Chatterjee, Barrister-at-Law, M.P.

OUR THANKS

We once deeply grateful to our Principal Dr. P. N. Banerjee, Vice-Principal Sri A. C. Karkoon, our President Professor S. A. Masud, Vice-Presidents Professors P. C. Chundar B. N. Mukherjee and S. K. Mitra and also to Professor Asoke Sen for their valuable advice and suggestions.

Our Vice-Principal has kindly procured for us an illustrious article *i.e.*, "Mimansa rules of interpretation" and Mr. D. N. Guha has kindly gone through the proof of that article. We take this opportunity to express our deepest thanks to them.

To the students in general we offer our heartiest thanks and congratulations for their keen interest in the publication of this magazine.

We are grateful to Sri Sudhindra Das Gupta, who contributed the Cartoons to our magazine and to Sri B. Mitra who took a keen interest in painting the coverpage. Sri Dasgupta and Sri Tarun Chandra Dutta have taken active part in many matters concerning the publication of the magazine.

We are also grateful to Sri Mrityunjoy Prasad Basu, the Superintendent of our college, and Sri Bijan Chakravarty and the staff of our college for their hearty co-operation in our work.

Lastly, we are grateful to Sri Bidyut Kumar Sen, Sri Nihar Ranjan Roy, Sri Pratyush Ghosh, Sri Durga Sahaya, Sri Niresh Chandra Bagchi, Sri Kanai Lal Koley, Sri Satyen Prasad Shaw, Sri Jahar Sen, Sri R. K. Anand and Syed M. Murshed who have gone through the proofs and performed other works relating to the publication of this magazine.

EPILOGUE

Now, we retire. But the blessed words of our Principal which inspire us on our journey also make us cautions. We are fully conscious of our drawbacks and short-comings. We however, will feel amply rewarded if our work inspires our successors to lift their standard of performance higher still.

ROLE OF THE OPPOSITION IN PARLIAMENT

Prof. Hiren Mukerjee

M.A. (Cal. Et. Oxon), B. Litt (Oxon) Barrister-At-Law, M.P.

A parliamentary "Opposition" is not an indispensable part of every possible constitutional system....In fact the game between the "Ins" and the "Outs" in the Parliament is often very much unreal. The Opposition in India, if it is to be effective at all, must forego British precedents in this respect. So says Professor Mukherjee here in his usual masterly style.

—[Editor]

There are certain comfortable illusions regarding the character of a parliamentary set-up and conventions accruing therein. They derive mainly from what one usually learns from Britain, so often proudly described as the "Mother of Parliaments". If one looks beneath the surface, however, one discovers that much of the vaunted parliamentary wisdom is based on sedulously propagated myths.

In Britain, we hear too often, freedom has slowly broadened down from precedent to precedent. The idea sought to be underlined is that in Britain things evolve slowly, at a respectable pace, illustrating what has been called "the inevitability of gradualness", and ruling out the conception of revolutionary change. It is discreetly forgotten that in that country Kings have been deposed over and over again, and one of them even beheaded, that from Wat Tyler to the Chartists a tradition of militancy has permeated British politics and that it was only Britain's acquisition, largely fortuitous, of an empire and the consequent ability of her ruling class to throw to the workers some crumbs from their table laden with imperial super-profits that has confounded working class politics and dulled the edge of social discontent and struggle. The tenacity with which the British ruling class tries to cling to its empire and the crafty showmanship with which, for example, it stages the medieval mummerly of a Coronation so that its fumes will send the people dosing into a kind of torpor, only prove that the rulers of Britain are well aware of a crisis that threatens to blow up the myth of Britain's ineradicable adherence to certain sacrosanct forms of constitutional respectability.

One of such forms, it appears, is the idea of the Opposition in Parliament, whose leader in the House of commons has come lately to be even paid a salary out of the public revenues. The House of Commons is reputedly the world's finest club, and those who congregte there are supposed to be engaged, with all the paraphernalia of stage-managed seriousness, in a game

of see-saw, Government and Opposition alternating their roles from time to time. As in a play, the atmosphere is rather unreal, and there is little, if any, real change when a Labour government yields place to its Conservative competitor and *Vice Versa*. Much in the same way, the Democrats in the U.S.A, no more "Democratic" than the Republicans, who in their turn are no more "Republican" than the Democrats, conduct a similar performance. Ability to repeat this kind of performance is supposed to be the yard-stick of parliamentary capacity, and having imbibed this lesson we in India also repeat it whenever an occasion arises and throw gibes, for example, at the Parliamentary ineptitude of the most profoundly civilised of European peoples, the French.

The people of Britain, however drugged they may be by the subtle and cunning propaganda of their rulers, have not always hesitated to express themselves strongly on the banality of Parliamentary party politics. In the 18th Century, when George III wanted not only to reign but also to govern and those who opposed the "King's friends" had no real policy and programme to offer the country, a doggerel was heard often in the streets of London :

*"What this rogue loses, that rogue wins,
"All are birds of a feather,
"Let's damn the Ins and damn the Outs,
"And damn them all together."*

Orthodox parliamentarians believe that what-ever the structure of society, there has to be an opposition in the Legislature and that from time to time the Opposition should in its turn form the Government. This may very well happen in certain circumstances, but it can by no means be an immutable principle. Even if we take the British example, we see that there are certain mining areas in South Wales where a Labour candidate is not opposed by a Tory for the simple reason that the latter has no support. What will happen if in the whole country the composition and the outlook in every constituency is like that? Obviously, elections would be generally unopposed in a Party sense. Indeed, this was the dilemma which confronted M. Herbert Morrison a few years ago. What would happen if Socialist policy was a success, if a great bulk of the people were won over and all the constituencies voted Labour? In that case of course there would not be a Tory party in Parliament. It was too terrible to think, and so Mr. Morrison made the hare-brained suggestion that the ideal composition of Parliament should be two-thirds labour and one third Tory! This is the level to which European Social—Democracy deteriorates; this is where "labour lieutenants of the capitalist class" end up ideologically.

In a new society where class war has been eliminated, the see-saw between Government and Opposition playing at politics seems antiquated and somewhat amusing. There, on account of agreement on social objectives, Party politics of the usual parliamentary pattern becomes out of date. Differences over details of work may persist, but the general line is agreed to by all Society is integrated.

The pre-conceptions of Parliamentary politics and its normal concomitants as found in Britain do not, thus, represent the alpha and omega of political wisdom. this is a matter on

which we should be clear. And certainly, we should not expect in the working of Indian Legislatures today a repetition of what happened in nineteenth-century England.

We have in India today the Congress Party in power in the Centre and also except for a few shaky instances, in the States. The Congress Party at present is, whatever certain aspects of its past, a party of Conservatism, a party of the *Status quo*. This is writ large over all it does, its fear of popular movements, its frantic boosting of a Five-Year Plan which seems to be not a prize to be won by the people's enthusiasm but a predicament to be got through, and its contented acquiescence in the control of our economy, and therefore of our politics, by Anglo-american imperialism. Against Congress there is ranged in the legislatures an assortment of parties, some of whom are innocent of ideology and therefore of little account in the fight for a new social order. It is those who wish to see, as speedily as possible, an end to our present crisis-ridden economy and to our inglorious involvement with imperialist interests it is those who wish to bring about an early emergence in India of a new and truly democratic society where exploitation of man by man shall cease, who really constitute the Opposition whether in or out of the Legislatures.

This Opposition cannot function, or even wish to function in Parliament as if an entertaining, and occasionally mildly exciting, game of see-saw is in progress. This Opposition cannot cherish the hope that springs eternal in the breast of British Labourites, for example, that they might also form a Government for a while, play at administration, take care not to effect basic changes, and then be back again as Her Majesty's Opposition. This Opposition tries to link up work in the Legislatures and outside them, to expose the character of class rule, whatever its cloak, and to help as far as it can the development of mass movement and mass strength to wrest power from the microscopic minority which rules our destinies. This Opposition cannot and must not function in a purely Parliamentary orbit. Bereft of its links with popular movements outside the charmed circle of Parliament, its feet of clay would be obvious and its speeches would be so much waste of breath. Its role can only be fulfilled when it scorchingly exposes the administration's basic character, furnishes through such exposure real ammunition for the people's struggle for a better life, and always seeks strength from the only source of a real inspiration—a live, unceasing link with the collective movements of the toiling people. This Opposition cannot feed itself on illusory hopes of an inevitable, if gradual, broadening of Parliamentary liberties till one fine morning we find all our problems solved. This Opposition must make its own contribution, from the platform that Parliament offers, to that growing movement of the people who through their own experience are being steeled in the effort for fundamental change. If, sometimes, we feel despondent about the rate of its growth in India, we should remember what was said three hundred years ago by an English parliamentarian: "Have no fear; it must be worse, before it is better."

1955

By this article, a foreigner educationist puts forward a few weighty suggestions to cheer up the Indian law students depressed by the dullness of their future profession.

22

THE LAW STUDENT AND LEGISLATION

Mr. J. D. M. Derrett

Lecturer, School of Oriental and African Studies, University of London and
Tagore Law Professor for 1953, Calcutta University

I understand from what I was told during my recent (and most enjoyable) visit to Calcutta that the prestige of the law degree has gone down in recent years, that fewer and less enterprising youngsters are taking up law seriously as an academic interest and that fewer students regard the law as an attractive career. If what is really meant by this is that the Bar has become overcrowded, and that political events during the last eight years have diminished the flow of work that the Calcutta Bar might otherwise have expected, then I have no complaint to make: the result seems perfectly reasonable. There is, however another side to the matter, and it is about that I wish to write a few lines.

The study of law at a University in the Commonwealth is inevitably connected very closely with legal practice. Whereas in Civil Law jurisdictions one finds numbers of young people taking up law in their first degree as a branch of human learning, and without any desire to become either advocates or judges in their subsequent careers, amongst us the study itself has such an esoteric character, being so closely bound up with the (to continentals) fascinating process of working out the law through decided cases, with all the attendant litigation risks, that very few of our students who desire education for its own sake tend to choose law, for they understand that the involved and sometimes tedious process of swallowing the mass of changing and almost undigestible rules that make up "Contract", "Equity" or "Conflict of Laws" (to say nothing of "Hindu Law") is really only bearable if one has the strongest incentive or inducement to enter upon it.

Yet India is no exception to the fact which can be observed elsewhere in the Commonwealth, as in the United States, namely that the very life of the country cannot go on without the constant and active participation of trained lawyers in several key posts. The judges and advocates who actually enforce and interpret the law, whether it be law manifest or law latent, are indeed the products of the Law Colleges, and without the highest standard of achievement in those law schools the best cannot be expected of those highly important people. But they are by no means the acme, the be-all and end-all, of the public trained in law, though the inclination they sometimes show to be treated as if they were is not altogether inexplicable.

For the law by which we all live—even a *bidi* cannot be purchased without law—is not really made by them at all, but by the public, which constantly seeks to put into practical expression ideal solutions to practical problems. This search for the ideal is not inspired by legal training; it derives from fundamental human desires which legal training does not even control. Law as it is known in the law schools is the scientific observation of law in action, not an attempt to canalise the sources of law, which are present even in the most unlearned breast.

The law student is a potential legislator, differing from his lay fellow-citizens in that he knows how previous attempts at legislation (whether immensely old or relatively innovating) have turned out in practice to affect ordinary lives. His task is not only to learn the rules in order to answer problems in the examinations, but to understand how they come to be what they are, and also to exercise perpetual vigilance to observe where they deviate from an ideal norm. In deciding in his own mind what the ideal solution would be, given the facts of life as he sees them, he will be exercising a common faculty, but he will have the advantage of knowing the technical difficulties in the way of imposing an apparently simple and obvious solution. At first he will find injustice and non-equity in so many rules, but later on he will recognise the normal tendency in law for a greater good to demand sacrifices in details.

Thus I suggest that a student faced with the task of “mugging-up” masses of rules might ask himself whether or not he is actually preparing himself to perform, if not the task of an advocate pure and simple, or a commercial adviser, consultant, and so on, at least the task of the informed member of the public, whose means of employment might not be in a strictly legal field, but a part of whose energies are to be devoted to watching the progress of the law of his land. I do not suggest that every law student can become a watch-dog in respect of every branch of the law. Some highly technical fields, such as Income Tax, affect almost every substantial wage-earner, and are second to none in general importance; the country's welfare could not be attended to at all without the aid of the various branches of the Revenue. Nevertheless unless a special interest is present and some experience in interpreting the statutes it must be very difficult for even an LL. B. to criticise and superintend the working of such an involved and abstruse branch. There are other examples which may easily be called to mind. But on the other hand a very wide field remains, in which one who has had the advantage of a legal training can exercise his talents to the general advantage. Particularly in the realms of private law, criminal law, commercial law and procedure, the trained lawyer may be said to be almost under an obligation to lead and advise his fellow-legislators.

India is well-placed in this respect, since it is now the general rule that no one may study for a law degree unless he has an arts or science degree already. In England, unfortunately, students who wish, and are encouraged, to study law as a phenomenon from every angle, are handicapped by the fact that they are admitted to the degree without any previous higher education at all. This tends to produce a rather less than objective approach to their subject, and encourages the authoritarian attitude to law which is so characteristic of the English system. On the other hand they will not approach the subject without seriousness and belief in its being

worth-while, on a parity with other branches of learning, and though this attitude lacks the balance which the more sceptical approach of the ex-history or ex-chemistry or ex-mathematics man is bound to bring to the task I have found as a rule that their powers of absorption of the rules and of rationalising groups of rules are on the whole somewhat higher than those of their colleagues who take up law later in life, and who find it difficult to believe that any rule is God-sent and self-existent.

But India is different from other Commonwealth countries in another respect: the great mass of the people do not admit the validity of the Common Law empirical approach to law. Our maxims that the law must be deduced from the cases, and not that the cases must be tested by theoretical standards, imaginary standards of law; and that whatever is passed by the Legislatures must be law, independent of Right or Conscience; such maxims are very far from being accepted by the typical Indian.

His notions of Right are almost entirely *a priori*, and his contempt for the present systems of administration of justice is frequently made known. Though he is willing to utilise the courts for his private purposes he does not, as a rule, believe that the law there administered truly represents the ideals in which he believes. This fact requires to be liberated, examined, and sympathetically analysed. We cannot run away from the discrepancy for ever. Either the court law has to be amended in order to meet the demands of the villager, or the villager must be persuaded that his naive notions are incapable of realisation under modern conditions. For myself I suspect that a gradual adjustment and compromise will eventually be reached, which will not bear a close resemblance either to the law of the British period or to the fanciful justice of Ram-rajya. But the task of bringing such a compromise to birth will be not the practicing lawyers (who are too busy and too concentrated on their own limited aspect of the subject) so much as the legally educated body employed in the wider fields of life.

If every rule must be tested and must be made to bear the burden of proof, whether it be justified, up-to-date, efficient and consistent with its fellows, whether it makes a piece with the other rules which jostle it in the memory and in the text-books, one may naturally ask how is the student to equip himself if he is to be one of the judges in such a case. Upon this subject I have a number of suggestions to offer.

Before he approaches his task he must make up the mind that legal rules differ from moral rules and religious rules in that they express in an enforceable form man's social desires (as distinct from his personal desires which he is often aware to be quite another matter). Unless he is clear upon that difference he may slip into the error of supposing that, for example, an ethical good can be directed attained by legislative means. Divorce and Prohibition are good examples for my purpose. People are pretty generally agreed that divorce is an evil which ought to be avoided as far as possible, and that drunkenness is likewise something repulsive, leading to many socially undesirable results. Yet it by no means follows that in certain hard cases man and wife should be bound together for life by legal bonds which are openly contradicted by every other circumstance in the couple's existence; this would make a mockery of law.

Nor does it follow that by removing by legislation easy opportunities of drinking one will effectively combat all the evils of drunkenness. In each case the ethical good must be attained by other means, which the legislature may, if it is wisely directed, assist and foster; in the case of divorce the law must admit a breakdown where society cannot any longer pretend that the marriage contains a useful meaning; and in the case of prohibition the law may do its best to discourage drinking amongst those who are, for one reason or another, naturally discouraged. In their instances the ethical good is attained not by legislation, by the fact of their being too poor or too obstinate to evade the regulation but by a change in the standard of living; in fact those who are aimed at directly by the law are not those who most need the reform, but those whose habits probably do not in reality constitute all ethical evil at all. But it was not my intention to dilate on the controversial topic of prohibition, but to indicate how in assessing a legal rule one must first be clear in one's own mind that its content is to be judged against one standard only, namely that of putting into practice a desire of the community which, though ideal in character, is derived from the social sense of that community and not from a merely moral, a merely ethical, or a purely religious (and thus highly personal) consciousness.

The next stage is to acquaint himself with the current law itself. He must be aware that law has two aspects, by definition. It is the sum total of rules which may be enforced by the courts, and it is also that collection of rules which are potentially enforceable by the courts at a given time, though no living person may be aware of it. The text-books are never up-to-date, and their contents must be supplemented by the experience of practitioners who, fortunately, make up the teaching-staff of the law schools. Even the parts of the text-books which are not entirely and obviously obsolete, because they have not been judicially disapproved, may in fact be unsound, wherever the authors have attempted to rationalise and justify rules by reasonings which will not, when tested in practice, serve to stand the weight of a new development. Thus the student must have a wary eye for all statements of opinion, and must take the decided cases as his bed-rock foundation, working from there upwards. He must, of course, be prepared for the shock of finding some cherished decision, even of the Privy Council, overturned one day, but the elasticity of thinking which this subject demands is rather encouraged than otherwise by such experiences. Remember that law must not fossilise in the head, nor transmute itself into a number of catch-phrases, to be trotted out in season and out of season, and serving only to date their owner as "someone who took his LL. B. before so-and-so's case got into the books"!

What about that part of the law which is potential? In our law examinations at London, particularly the LL.M., we pride ourselves on asking a number of moot points in the problems. A student cannot enjoy legal study unless he sees himself as part of a flowing stream. He himself can contribute to it, not only as a legislator, as I have already said, but as a technical participator. There are always a large number of undecided points which cry aloud for a decision. The courts are usually timid, disliking to attempt to create new advances and fill up the gaps. They are not concerned with the academic lawyers' desire to present a clean sheet, a gap-

less account of the law upon a topic. They put off, whenever they can, the responsibility for allowing the law to progress and express itself. But sometimes the duty cannot be put off any longer and then the law lurches forward and a new rule is born. At that time the deliberations of those who have had the leisure to study the subject academically come into their own, or at least they would do so, were it not for the practising lawyer's indifference to the writings of his academical brethren. He would not be so indifferent if fresh problems in law were taken up more frequently by the courts or if law journals were known to contain solid and frequent contributions to the solution of legal problems.

Here the law student is in his element. He is free to express any view he chooses, provided that he sticks to the rules and treats the decided cases according to the approved technique, sorting out the dicta from the ratio and so on, analysing the facts carefully and detecting how far the judges applied their minds to the relevant circumstances of the case. In India he has a great advantage which is presented not at all in England, but only to comparable extent in the United States; with the very large number of High Courts and the Supreme Court he is enabled to compare conflicting decisions on identical problems from Courts of equal authority, and there is a final court of appeal to which he may address his suggestions for the resolution of the conflicts.

The task of weeding out the bad decisions, homologating and systematising the sound decisions, and resolving conflicts between sound decisions from different High Courts, or emanating from within a High Court, can be facilitated by study and by frequent attendance at Moots. Moots are an important feature of the law student's training and should be indulged in frequently. The best method of exploiting this means of instruction is to take a point not yet decided in any court, a set of facts not exactly corresponding to any problem yet solved, and to attempt to find the solution with reference to the law as hitherto discovered in the cases. The step into the unknown combines adventure with profit, since if those who take part in the Moot treat the matter seriously it is quite possible that the judgment given by the "bench" which "does" the Moot may set off some reflection in an advocate's mind which may sooner or later affect the disposal of actual litigation.

In these ways the student becomes acquainted with those parts of the law which are considered suitable as media of instruction for the law degree. He comes to know it as it is, and can make intelligent guesses about its potential aspect. Then he may ask himself whether it ought to be as it is, and whether it could not be improved and in what ways. He may seek for historical and other explanations for the rules being as they are, and he will soon see the law for what it is, namely a tool, and one that can easily have its edge turned, that requires constant re-setting and sharpening.

He need not feel that his interest or enthusiasm will not be listened to, or that his efforts will remain unappreciated. India supports numerous legal periodicals, most of them starved of penetrating contributions, if we except a few well-known instances. Apart from the regular publications the law students have an outlet in their own hands. One of the regular features

of law journals or reviews (notably the Harvard Law Review in the United States) is a series of notes on cases, articles on legal topics and even drafts of proposed legislative acts, all supplied by the students themselves. The students act as editors, and accept, if they think them of sufficiently high standard, articles submitted by members of the teaching staff! None of the judges of the American courts can afford to neglect reading the Harvard Law Review, and numbers of its articles are to be found in the syllabus prescribed for English law study. A continuity of standard, if not of editorial personnel is maintained without difficulty and as a result of keen competition.

When next I have the pleasure of visiting Calcutta nothing would give me a greater thrill than to find that the law students were taking an active part in their country's legislative affairs, not only by promoting healthy criticism of case-law but also by letting the legislators know that Delhi is not so far off, after all. An aspect of their studies which will redound to everyone's advantage, it will achieve the blessings of the elders in the profession, and will bring renown beyond the reach of my humble good wishes.

1955

The grand oldman—now at the helm of another Law College in Calcutta—provided us with a flood of humour while giving a lot of interesting evidences on Circumstantial Evidence in our Legal Conference held recently.

23

CIRCUMSTANTIAL EVIDENCE

Dr. S.C. Choudhury

(Principal, Surendranath Law College)

Circumstantial Evidence covers a vast field and you have access to very learned books dealing with the subject. I propose to deal with the subject from the point of view of the layman, who, unknowingly, has to apply the rules of circumstantial evidence in the affairs of every day life. Take, for instance, you see a man hurrying alone towards Howrah Station; you draw the natural conclusion that he is anxious to catch a train which is due to leave presently. But your conclusion may be wholly wrong. The man may just be taking his share of daily exercise, or, for all you know, may be trying to avoid a persistent creditor.

One thing is worth noting, Circumstantial evidence can only succeed in establishing conclusions on the assumption that men are normal and their actions are normal. Even the man who is himself abnormal takes it for granted that others are normal. Take the case of a man who is cross-eyed. He looks one way and goes another. I will give you an instance where two cyclists collided—both of them, unfortunately, being of the cross-eyed type. Both come to the ground more or less hurt. Addressing the other, one says “why don’t you go the way you are looking?”. The other says “Why don’t you look the way you are going?”. Here you see how we may be misled into faulty judgements by circumstantial evidence. It is said, ‘Circumstances never lie,’ but they do not, by themselves, tell the truth either. It may be that faulty reasoning may lead us into falsehood. But it is also very true that a scientific approach may extract from circumstances a higher degree of truth than can be had from direct evidence.

Let us draw an instance from American humour. Mark Twain had occasion to request a young lady to mend a pencil for him. The lady obliged him but the work was done rather badly. It looked as if somebody had been biting the pencil. It may be the knife was blunt or the wood was bad. Said Mark Twain to the lady : “Madam, I saw you do this with a knife, and that is Direct evidence; but if I had to rely on circumstantial evidence I would say, you did it with your teeth.”

Let me next take you through an actual case where a mass of circumstances resulted in a conclusive finding by the jury. This is the case of a medical man named Crippen. You will find the case elaborately reported in the celebrated Trial Series and I would advise you to go through

it for the pure intellectual pleasure you will get out of it. This Doctor Crippen was a clever surgeon and a successful man in his profession and moved in tip-top society. His wife, whose parents were Americans, was a popular figure in social circles in North London, and Treasurer of a local Ladies' Club. They had no children. The only other person involved was Crippen's Lady typist, a young girl named Le Neve. It so happened that one evening husband and wife, asked a married couple to dinner and the four of them spent hours together till late past midnight. Thereafter Mr. Crippen just vanished into thin air. When her friends enquired, Crippen put them off by various excuses. To some he said that she had gone to her parents in America, but he could give no idea of her address there; to others he said that she left him in order to spite him, to others still he gave varying and conflicting statements, and finally, to the Scotland Yard detectives he said that he had been deliberately telling all sorts of untruth because he wanted to conceal the actual state of things namely, that she had quarrelled and had left him in anger. Police search in Crippen's house proved fruitless and no clue was available.

Scotland Yard now took advantage of the wireless invention which had only recently been added to man's scientific achievements. Messages were broadcast all over the world by radio waves and ships on the high seas also caught them. These messages said that a murder had been committed and invited one and all to help to trace the culprit. Murder of Mrs. Crippen was suspected because, in the interval, certain things had happened. Crippen had suddenly disappeared. Now, an innocent man does not behave in this fashion. The Police were, naturally, suspicious. They broke open Crippen's main door and began intensive search. And the search bore fruit. One officer noticed that a part of the kitchen floor looked newly done up. The floor was dug open and buried within were found bits of women's clothing with laundry marks which were reserved for the Crippen family. Also were found traces of blood and bits of skin—particularly a piece which looked like human skin and had a mark about an inch long,—answering to an operation mark. The Chemical examiner reported that the skin was human skin and the blood gave the reaction of human blood. This, of course, is no evidence of murder but a circumstance that, along with other things, may prove murder.

To proceed with our story. A ship leaves Antwerp bound for New York fully packed with passengers. On the ship are two passengers, Mr. Robinson and Master Robinson—father and son. The Captain of the ship, who has received the wireless messages, sees a peculiar circumstance : father and son as inseparable companions on the steamer. Such a thing is extraordinary and has never happened before. As a rule, an elderly man, as Crippen was, keeps company of the grown ups and smokes cigars and plays chess, while a young man mixes with boys of his own age and is specially attracted by the company of young lady travellers. But here was an exceptionally good looking young man—Master Robinson—who studiously avoided womankind. Furthermore, at the dinner table Master Robinson took meals in tiny morsels, handling spoon and fork with the grace of a woman of refinement. Now, a boy of that age would eat with the voracity of a tiger; this young man's total consumption of food would fall short of the other's mouthful! Another very significant feature was that the two would sit together for hours and talk in whispers, always stopping when anyone approached. Well, what

conversation can there be between father and son which no stranger should ever be allowed to overhear? There were many other items of circumstantial evidence too long to recite here, *but you have enough here to enable you to appreciate what this kind of evidence is. The jury had no difficulty in coming to the only conclusion that was permissible.

As time is short, I shall leave aside actual case law and try to illustrate my subject by examples drawn from outside the preserve of the lawyer. In the sphere of mythology let us ask if Dhritarastra was actually blind. My answer is that the conclusion is based on purely circumstantial evidence which is incomplete. We are told, if not blind why did he ask Sanjaya to tell him what was happening on the field of Kurukshetra? It may be because he wanted an unprejudiced picture which could only be had through an impartial spectator. It is admitted fact that he was extremely, and even unjustly, partial towards Duryodhana and his group. In fact the circumstance that he, as elder brother, did not get the throne which went to Pandu is taken as proof of blindness. But such argument cannot be conclusive of blindness; and there are no photographs to prove one way or the other. Similar is the case of Homer, who is dogmatically asserted as the blind poet. But was Homer blind? The ancients took it for granted. But as our esteemed friend here, our Tagore Law Professor Dr. Derrett will bear me out modern scholars have found no conclusive evidence of it. It is alleged that in the Greece in Homer's day everybody worked, and it was a matter of shame for any one to eat his daily bread without earning it. There was one exception—the blind person. The blind were, therefore, enjoined

*** Here are additional circumstances :—**

1. Hyoscin, a deadly poison, was found in the remains found buried in the kitchen floor.
2. Crippen, shortly before, had bought 5 grains of Hyoscin from Burroughs Wellcome & Co., a well known firm of Chemists. (Very likely the body was dismembered after death had been caused by poison).
3. Mrs. Crippen disappeared as from 1st. February, 1910.
4. On 2nd February Crippen pawns the ring and earrings of Mrs. Crippen for £80/-.
5. On February 9 he pawns other jewellery of Mrs. Crippen for £115/-.
6. Locks of hair, found with the buried remains had the same brown colour as Mrs. Crippen's hair.
7. Three hair curlers were found with the hair—the types of curlers which Mrs. Crippen was in the habit of using.
8. Portions of the sleeping costume of Crippen also found buried there stained with blood.
9. When arrested Crippen made the remark : "She knows nothing".
10. The suit of man's clothing which Master Robinson (Miss Le Neve) wore (presumably ready-made garment) did not quite fit the figure of the wearer.
11. Mr. John Robinson (Crippen) was nervous when he noticed several persons coming in the Pilot boat to steer the ship into port, and made remarks about it to the ship's captain.
12. As a medical student Crippen had shown special skill in the subject of "Anatomy", and therefore, was competent to dismember a body successfully, quickly and unassisted.

to sing and thus contribute to human happiness. Hence, as a corollary, whoever does the work of singing must be blind. To push the conclusion a little further the better the singer the more confirmed the blindness. Then, again, it is said that the classical bust of Homer shows him blind. But the man who made the bust lived hundreds of years after Homer.

Let us finally ask if Milton was blind. The answer is 'yes' because we know it as a historical fact. But what caused the blindness? There we fall back on circumstantial evidence. Some say he studied in dim light during his enforced secret stay, others that he overworked them to their ruin. The poet himself assigned it to a "dim suffusion". But I suggest to you that the best explanation is that of the poet who suggests that in his journey through infinite span to behold the beatific vision.

"He passed the flaming bounds of Space and Time,
The Living Throne, the sapphire blaze,
Where Angels tremble as they gaze, he saw;
But blasted with excess of light
Closed his eyes in endless night."

Next let me take an example from the science of Economics. Circumstantial evidence made it apartment to Industrial England that free trade always bought prosperity. It was only true as between highly developed and comparatively poorer countries. But as between America, with her enormous resources, and England the doctrine did not prove quite satisfactory as will appear from the mournful couplet composed by an English citizen :—

"There America the Almighty sitting on her bags of gold,
And here the income tax being multiplied a hundred fold."

I shall conclude with a simple and homely illustration. At the end of every speech there is a clapping of hands. What is the conclusion? Again, circumstantial evidence, conclusion doubtful. It may be because the speaker gave pleasure by speaking. It may also be because he showed mercy by stopping.

CONSTITUTIONAL LAW OF THE UNITED NATIONS AND THE TRUST AND NON-SELF GOVERNING TERRITORIES

Purnendu Kumar Banerjee

M.A., B.L., DSPE., LL.M., Ph.D. IFS

*Second Alternate Delegate of India and Chairman, Political Committee,
International Commission for Supervision and Control in Laos*

1. The 19th Century witnessed the gradual development of the concept of international responsibility towards the peoples of dependent areas. For example, the Congo Basin Treaty, signed at the Berlin Conference of 1885 and the Brussels Conference of 1890 provided, among other things, clauses for the suppression of slavery, and for the restriction in traffic of firearms and liquors with respect to certain areas in Africa.

2. The end of the First World War brought before the International Forum the problem of the disposition of territories detached from enemy states. The mandate system of the League of Nations was introduced and is rightly considered a great step forward in increasing international responsibility for the peoples of a certain type of the dependent territories. Its fundamental principle, which was stated in Article 22 of the Covenant of the League, was that the well-being and the development of these territories, inhabited by peoples as yet unable to stand by themselves, shall be regarded as a sacred trust of civilization. The character of the mandate differed according to the stage of development of the population, the geographical factors, and economic conditions peculiar to the territory. Three different categories were defined :

Category A — these were countries provisionally recognized as independent, but which were to receive advice and assistance of the mandatory power until they were able to stand alone (Syria, Lebanon—French Mandates; Palestine, Trans-Jordan and Iraq—British Mandates).

Category B — these were territories whose people were at the stage that the mandatory must be responsible for the administration of the territory (Cameroons, Togoland and Tanganyika—French and British Mandates; Ruanda Urundi—Belgian Mandate).

Category C — these were territories subject to the safeguards in the interests of the indigenous population which could be best administered under the laws of the mandatory as an integral portion of its territory (Southwest Africa—South African Mandate; Western Samoa—

New Zealand Mandate; Nauru—British Mandate; New Guinea—Australian Mandate; Mariana, Caroline, Marshall Islands— Japanese Mandate).

3. The Council of the League which was responsible for all League functions concerning mandated territories set up a Permanent Mandates Commission composed of experts to assist it. The Commission among other duties, examined the annual report from the mandatory powers and examined petitions. It sent in certain exceptional cases, special missions to mandated territories.

4. Although the Dumbarton Oaks Text contained no reference to mandates or trusteeship, it was inevitable that this subject should be raised at San Francisco, if only because some provision had to be made for carrying on, under international sponsorship some of the mandated territories established after World War I. At the Yalta Conference in February, 1945, the U.S.S.R., the United Kingdom and the U.S.A. agreed that the United Nations Conference on International Organization be convened in San Francisco in April, 1945, and should set up a Trusteeship System. The system was to apply to territories placed under trusteeship by subsequent agreement.

5. Formal proposals on this subject were put forward by the Governments of Australia, U.S.A., U.K., U.S.S.R., China and France. In the absence of a basic Dumbarton Oaks Text on the subject, Commander Stassen of the United States Delegation was deputed to put forward a Working Paper representing the maximum area of agreement between the different proposals. This Paper was accepted as a basis of discussion. It had two parts, the first dealing With the general policy and a statement of principles applicable to all Non-Self-Governing Territories, the second dealing with the principles and machinery of a new Trusteeship System applicable only to certain categories of Non-Self-Governing territories.

6. The San Francisco Conference agreed on provisions designed to promote the political, economic, social and educational advancement of the many millions of people in Non-Self-Governing Territories. These provisions were set forth in Chapters 11, 12 and 13 of the Charter. Chapter 11 of the Charter contains the First Joint Declaration in history by the major Colonial Powers on principles applicable to their Non-Self-Governing Territories. Under the terms of the Joint Declaration, the principle is accepted that "the interests of the inhabitants of these territories are paramount".

7. Chapter 12 established an International Trusteeship System through individual trusteeship agreements.

8. Chapter 13 defines the composition and functions of the Trusteeship Council.

9. Since the Trusteeship Council was to be composed of an equal number of States Administering and States Not Administering Trust Territories, Territories had to be placed under an International Trusteeship System before the Council could be set up. It was generally recognized that the Mandated Territories would be among the first to be transferred by means of individual trusteeship agreement to the Trusteeship System. Eight Trusteeship Agreements were submitted by five Member States for Territories administered by them under mandate.

With the approval of these Agreements by the General Assembly on December 13, 1946, the General Assembly, and under its authority, the Trusteeship Council, became responsible for supervizing the administration of the first eight Trust Territories.

10. It may be mentioned here that unlike other Councils, the Trusteeship Council does not have a fixed number of members. Its number and its composition depend upon its Agreements, and the parties to these Agreements. The process of selection is therefore, a complicated one. Article 86 says that it shall consist of the following Members of the United Nations :

(a) Those administering Trust Territories

(b) Others of the Big Five which are not Trustees

(c) Enough other Members, elected by the General Assembly for three years' terms to provide that there shall be as many non-Trustee as Trustee Members.

Professor Eagleton has rightly pointed out that new mathematical computations may be needed whenever a new Agreement is made. In fact, as has been stated before, after the adoption of these Agreements by the General Assembly on 13th December 1946, the calculations disclosed that Australia, Belgium, France, New Zealand and the United Kingdom were automatically Members since they were Administering Authorities, and the U.S.A., U.S.S.R., and China were also Members since they were permanent members of the Security Council, though not administering Trust areas. Mexico and Iraq were elected to complete the required number. When the U.S.A. accepted the Trusteeship Agreement as an Administering Authority, it necessitated the addition of two other Members to the Council.

11. It has been often asked whether Non-Self-Governing Territories (as contained in Chapter 11) should be brought under the Trusteeship Council. It will be observed from Chapter 11 of the Charter that the Administering Authorities of the Non-Self-Governing Territories are under no legal obligations, as they are under Chapter 12, regarding the International Trusteeship System of the Charter. In other words, Chapter 11, and particularly Article 73 is the symbol of international concern in the inhabitants of the Territories. It contains a declaration of principle and the moral responsibility of the Administering Authorities. It may be recalled that when Chapter 11 of the Charter was drawn up, the Administering Authorities had great misgivings in the matter. In this connexion, it will be interesting to quote a sample page of the short-hand notes taken by Mr. Byrnes at Yalta on February 9, 1945. The following is the transcription :—

Mr. Stettinius reads from a report :

"I have a brief statement as to Dumbarton Oaks. 'It is agreed that five governments which have permanent seats on the council should consult each other prior to the United Nations Conference as to the establishment of trusteeship'".

Mr. Churchill :

"I absolutely disagree. I will not have one scrap of British territory flung into that area. After we have done our best to fight in this war and have done no crime to anyone I will have

no suggestion that the British Empire is to be put into the dock and examined by everybody to see whether it is up their standard. No one will induce me as long as I am Prime Minister to let any representative of Great Britain go to a Conference where we will be placed in the dock and asked to justify our right to live in a world we have tried to save”.

The President :

“I want Mr. Stettinius to finish the sentence he was reading because it does not refer to the matter you have been speaking about.”

Mr. Churchill :

“If we are out I have nothing to say. As long as every bit of land over which the British Flag flies is to be brought into the dock, I shall object as long as I live”.

Mr. Stettinius :

“The only thing contemplated as to territorial trusteeship is to provide in the Charter of the world organization the right to create a trusteeship if it desires to do so. Later on, we have had in mind that the Japanese mandated islands be taken away from the Japanese. We have had nothing in mind with reference to the British Empire”.

Mr. Churchill :

“So far as the British Empire is concerned, we ask nothing. We seek no territorial aggrandizement. If it is a question solely of dealing with enemy territory acquired during the war, it might be proper to put them into some form of trusteeship under the United Nations”.

12. Since Yalta, the approaches of the Administering Authorities have changed and they have contributed by their active participation in the work of the United Nations with regard to the Non-Self-Governing Territories covered under Chapter 11 of the Charter. The General Assembly in 1946 set up an Ad Hoc Committee on Information from Non-Self-Governing Territories. The Committee's life was extended in 1948 and in 1952 for another three years. Many people rightly consider the setting up and working of this Committee as considerable progress made in the interest of the people from Non-Self-Governing Territories. When the Charter is revised, if, with the agreement of the Administering Authorities, this Committee could be made as a permanent committee, it would then be able to make further contributions in the matter. It is doubtful whether any attempt will be made to bring the Non-Self-Governing Territories under the direct supervision of the Trustee-ship Council. The effort of the Administering Authorities for the improvement of the people of Non-Self-Governing Territories and the mature concern of the non-Administering countries could be properly integrated. Any hasty decision will only adversely affect the progress so far made.

13. The International Trusteeship System has the following objectives :

- (a) To further international peace and security.
- (b) To promote the economic, social and educational advancement of the inhabitants of the Trust Territories and their progressive development towards self-government or

independence in accordance with the circumstances of each Territory and the wishes of its people, and as may be provided by the terms of each Trusteeship Agreement.

- (c) To encourage respect for human rights and fundamental freedoms for all without any distinction as to race, sex, language or religion, and to encourage recognition of the interdependence of the peoples of the world.
- (b) To ensure equal treatment in social, economic and commercial matters for all Members of the United Nations and equal treatment for the Nationals of Member Nations in the administration of justice, provided this does not conflict with the attainment of the other objectives of the Trusteeship System.

14. The International Trusteeship System applies only to those territories which may be placed under it by individual Trusteeship Agreements. They are known as Trust Territories and fall into three categories :—

- (a) Territories held under League of Nations Mandate.
- (b) Territories detached from Enemy States as a result of the Second World War.
- (c) Other territories voluntarily placed under the system by the States responsible for their administration.

15. The functions of the United Nations with regard to Trusteeship Agreements for all areas not specifically designated as strategic, are exercised by the General Assembly with the assistance of the Trusteeship Council. All such functions relating to strategic areas are the responsibility of the Security Council. It is assisted by the Trusteeship Council. The objectives of the International Trusteeship System apply equally to the peoples of strategic areas.

16. The Trusteeship Agreements vary but most of them contain provisions such as definition of the territory, designation of the Administering Authority, obligations and rights of the Administering Authority, and a clause which stipulates that any dispute between the Administering Authority and another Member of the United Nations concerning interpretation or obligation of an Agreement which cannot be settled otherwise is to be submitted to the International Court of Justice.

17. Most of these provisions are included in the Strategic Area Agreement, though less in detail. There is also a difference between the Trusteeship Agreement for Non-Strategic Area and the Trusteeship Agreement for the Territory of Somaliland under Italian Administration. It appears from Article 6 of the Declaration of Constitutional Principles that in matters relating to defence and foreign affairs as in other matters, the Administering Authority, namely, the Government of Italy, shall be accountable to the Trusteeship Council and shall take into account any recommendations which the Council sees fit to make.

18. A Trusteeship Agreement is not signed as an agreement between two parties. The Administering Authority accepts the rights and obligations with regard to the Trust Territory and this Declaration is approved by the General Assembly.

19. The Trusteeship Council consists of the following Members of the United Nations :—

- i) Members administering Trust Territories. This practice follows from a proposal put forward by the U.S.A. in San Francisco.
- ii) Permanent Members of the Security Council which do not administer Trust Territories (this suggestion was made by the U.S.S.R. in San Francisco and adopted by the U.S.A.) and
- iii) As many other Members elected for a three-year term by the General Assembly as will ensure that the Membership of the Council is equally divided between Members which administer Trust Territories and Members which do not. This proposal was made by the U.S.A. in an effort to create both balance and confidence.

20. Each Member of the Council designates a Representative to the Council. Under the Mandate System the Members of the Commission were experts, whereas Members of the Trusteeship Council are Representatives of their Governments. As has been mentioned before, Italy is not a Member of the United Nations, but is an active participant of the Trusteeship Council.

21. The Chairman of the Trusteeship Council is elected on a basis of rotation every year. If, for example, this year an Administering Authority country holds the Chairmanship, next year the turn will go to a non-Administering Authority Member of the Trusteeship Council.

22. In addition to the category of Members mentioned above, Italy was invited to participate in the sessions of the Trusteeship Council as the Administering Authority of the Trust Territory of Somaliland. The Supplementary Rules of Procedure—Rule A had to be changed accordingly. The General Assembly adopted the resolution sponsored by Argentina regarding the questions of Italy's participation in the work of the Trusteeship Council: It was observed that Article 86 of the Charter was attracted for the purpose of allowing Italy's Membership into the Council and that in accordance with Article 4 of the Charter, the General Assembly had already determined that Italy was a peace-loving State and was able and willing to carry out the obligations of the Charter.

23. When the Trusteeship Council was discussing Supplementary Rule A referred to above, the question of comparison of Membership of the Trusteeship Council to that of Membership in the Commission of the Economic and Social Council arose. The second sentence in Rule A as recommended in the Committee on the Rules of Procedure reads as follows :

“Upon the invitation of the President he may also participate without vote in the deliberations of the Council on general questions relating to the operation of the International Trusteeship System”.

The delegates of Argentina and Belgium wanted to drop the words “Upon the invitation of the President” on the ground that Italy should not be given a lesser position in the Council and that he should be given voting rights also. The delegate of Iraq opposed this on the ground that Article 86 could not be stretched to accord Italy the right of voting in the Trusteeship Council.

24. The American Delegation pointed out that in view of the words in Articles 86 and

89 of the Charter, the question of Italy's right to vote was a constitutional one. It was a question of interpretation of the Charter of the United Nations. It was felt that Article 89 of the Charter dealing with the right of voting in the Trusteeship Council laid down that each Member of the Council shall have one vote and Article 86 of the Charter prescribes who shall be the Members of the Council. Therefore, in American opinion, until the Government of Italy became a Member of the United Nations, Italy was not entitled to have a vote. This view was shared by the delegation of the United Kingdom. The U.K. Delegation further pointed out that either Italy, for the purpose of having a vote under Article 86, should be admitted first as a Member of the United Nations, or Article 86 should be amended in accordance with procedure laid down in Article 108.

25. It will be interesting to discuss the attitude of South Africa regarding the mandate of South-west Africa. With the exception of Southwest Africa, all territories held under League of Nations Mandate have either become independent states or been placed under the International Trusteeship System. The South African Representative explained to the General Assembly in January 1946 the particular circumstances of the Mandated Territory of Southwest Africa. These circumstances, according to him, were that the territory bordered on that of the administering power and that it was sparsely populated and unable to support itself. He informed the General Assembly later on that a majority of the inhabitants desired incorporation of the territory into the Union of South Africa. The General Assembly, however, decided that it could not agree to this incorporation and recommended that Southwest Africa be placed under the International Trusteeship System, through Trusteeship Agreement.

26. In July 1947 the Union Government agreed to maintain the status quo and to administer the territory in the spirit of the Mandate. It also agreed to submit reports on its administration to the U.N. In 1947 and 1948 the General Assembly again recommended to the Union Government that Southwest Africa be placed under the Trusteeship System.

27. In July 1949 the Trusteeship Council drew the attention of the General Assembly to the fact that the Union Government refused to submit reports and that the Union Government had made arrangements for closer association with Southwest Africa under the terms of the Southwest Africa Affairs Amendment Act., 1949 (111)(V).

28. The attitude of the South African Government in this matter was stated by the Union Representative—that there is nothing in the Charter to support the contention that a Government “could be compelled to enter into a Trusteeship Agreement even against its own views or those of the people concerned”. He further pointed out that the Charter does not impose upon the Members an obligation to place certain territories under the Trusteeship System. Article 77 reads : “The Trusteeship System shall apply”—but it continues—“to such territories as ‘may’ be placed thereon ‘by means of Trusteeship Agreement’.” Since a territory can be placed under Trusteeship only by a agreement, the voluntary consent of the state which has the right to dispose of the territory is necessary, whereas other delegations thought that to justify the opposite interpretation that Article 77 established an obligation to place territories indicated

in this Article under Trusteeship. They advanced the argument that if there was no such obligation a situation might arise under which no country would place its territories under Trusteeship. Kelson thought that this possibility does exist. Nevertheless, the Charter did not establish an obligation according to him, of the Members to place territories under Trusteeship.

29. Another interpretation was given and was that under Article 77 of the Charter, the Trusteeship System is applicable to three categories of territories, the first of which comprises territories now held under Mandate: The requirement of a voluntary act is maintained only in connexion with the third category, and could hardly be held applicable to territories under Mandate. Use of the word voluntary in the third category confessed the sense of compulsion in regard to the other categories, particularly Mandated Territories which are specifically referred to and emphasized in Article 80, paragraph 2, of the Charter, which does not condone any delay or postponement of the negotiations and conclusion of agreements for placing Mandated Territories under the Trusteeship System. Therefore, according to them, there is a clear obligation on the part of the Mandatory Power to place Mandated Territories under the Trusteeship System.

30. The General Assembly again considered the question of Southwest Africa on December 6, 1949, and reiterated its previous resolution. It asked the Union Government to comply with these decisions, and to submit reports on its administration. The General Assembly further requested the International Court of Justice to give an advisory opinion as to the International Status of the territory and the international obligations of the Union Government in this respect. The Assembly asked in particular whether the Union Government continued to have international obligations under the Mandate and if so, what they were : whether the provisions of the International Trusteeship System applied to the territory and if so, in what manner and whether the Union Government had the right to modify the international status of the territory, or if not, what authority would determine and modify this status (A/1216 and A/1217).

31. The International Court of Justice delivered its advisory opinion on July 11, 1950. It held :

- (a) that the authority which the Union Government exercises over the territory is based on the mandate. If the man-date lapsed as the Union Government contends, the latter's authority would equally have lapsed. To retain the rights derived from the mandate, and to deny the obligation thereunder could not be justified;
- (b) that the General Assembly of the United Nations is legally qualified to exercise the supervisory functions previously exercised by the League with regard to the administration of the territory and that the Union is under an obligation to submit to supervision and to control of the General Assembly and to render annual reports to it;
- (c) that the Charter does not impose on the Union an obligation to place the territory under the Trusteeship System. The language used in Articles 75 and 77 is permissive — "as may be placed thereunder". Both Articles refer to subsequent agreement by

which the territories in question may be placed under the Trusteeship system. An "agreement" implies consent of the parties concerned. The territories must be free to accept or reject the terms of contemplated agreement. In other words, the provisions of Chapter 12 of the Charter do not impose on the Union Government a legal obligation to place the territory under the Trusteeship System;

- (d) that the competence to determine and modify the international status of the territory rests with the Union acting with the consent of the United Nations.

32. This year the revision of the United Nations Charter will be due. The world will watch with interest as to how the members of the United Nations change and adjust, keeping in view the experience gained in the last ten years, the Chapters relating to the Trust and the Non-Self-Governing Territories to fit in the requirement of the fast-changing world.

BIBLIOGRAPHY

1. Byrnes, J. F., SPEAKING FRANKLY.
 2. Eagleton, C., INTERNATIONAL GOVERNMENT.
 3. Evart, H. V., UNITED NATIONS.
 4. Goodrich and Hambro : CHARTER OF THE UNITED NATIONS : COMMENTARY AND DOCUMENTS.
 5. Hall, H. D., MANDATES, DEPENDENCIES AND TRUSTEESHIPS.
-

LAW AND UNCERTAINTY

Prof. Prafulla Kumar Roy

M.A., LL.B.

Why is it so difficult for any lawyer to make any prophecy about the fate of a case?

In past, this is due to the fact that a decision may really be based on irrelevant circumstances. The judge dislikes the Advocate for the appellant; or dislikes the class to which the respondent belongs; or had a bad headache in the morning. All this may influence the decision, which, consequently, is unpredictable.

This opens out an interesting field of enquiry. But it is also a forbidden field. There is the law of contempt. Psychiatrists have not generally shown excessive respect for things regarded as sacred. But, as regards judicial psychology, their curiosity has apparently yielded to their prudence.

Leaving out psychological irrelevancies, there is still a problem, and a problem for lawyers. Assume that a decision may be based on emotional grounds. How does it happen that the judgment is a cold, colourless, logical document?

Take this illustration. As soon as an Advocate opens his case, the judge exclaims, "You appear for a money-lender—money-lenders are Sharks!" The Advocate understands that his case is "finished". But when the judge delivers the judgment he does not say something like this :

"In this case, the Appellant is a money-lender.

Money-lenders are sharks.

I do not help sharks.

The appeal is therefore dismissed with costs." Instead, he refers to theories about the interpretation of relief Acts, and the "spirit and intendment" of the relevant statutes, their history, relevant precedents, and so on, and then, after a supremely instructive intellectual performance, comes to the inevitable foregone conclusion, "This appeal is dismissed with costs."

The judgment, predetermined on purely emotional grounds, appears dressed up in perfect logic.

There are several reasons why this can be done. The text of a statute can never be made mathematically precise. Even if it were possible, the application of the law to a baffling variety

of facts would still bring in uncertainty. The judge has to be given some amount of discretion, sometimes very wide discretion.

But one of the most interesting reasons seems to be this. Our legal system itself is not a logical system at all.

We believe, for example, that when two men have signed and sealed a document, neither of them should be permitted to say that he intended to mean something other than what the writing means. An investigation of what somebody might have had at the back of his mind is worse than useless. As an English Judge put it "The Devil himself knoweth not the thoughts of men".

We have given formal expression to this belief in our Evidence Act, Sections 91 and 92.

On the contrary, we cannot always rule out an enquiry regarding a man's intention. *A* pulls the trigger of a revolver, believing that the revolver is not loaded. It is in fact loaded, and *A* kills his friend *B*. Is *A* guilty of murder? No, for he had no intention to kill anybody. Can a Judge know a man's intention? Yes, for as another English Judge has said, "The state of a man's mind is as much a question of fact as the state of his digestion". The Devil may not know what is inside a man's mind; but Judges may succeed where the Great One would fail.

So we have a law of contract in which contract is defined in terms of consensus or union of mind with mind; a law of evidence, which makes the expression final and conclusive, ruling out any enquiry into undisclosed intention; and finally, a Specific Relief Act, which empowers a Judge to 'rectify' a written contract. How elegant and harmonious this whole system borrowed from England is, can be seen clearly by anyone who looks into the bewildering mass of case law on Sections 91 and 92 of the Evidence Act.

The layman may be confused; but we have this by way of compensation—the Judge is free. No doubt, the law is uncertain. But so is life itself. We do not complain. Law, like life, is probably all the more interesting because it is so uncertain.

SOME REVOLUTIONARY CHANGES IN THE LAW OF TORTS

Sri S. Ramaswamy Iyer*

A few days ago I had the privilege of addressing the students of the University College of Law, Calcutta, in a meeting of their College Union.[§] My object in speaking to them was to draw their attention to the great contribution which the law of torts has made and is making to social peace and neighbourly conduct among the English people and to a similar use which we can make of that law in our country at the present stage of our evolution as an independent nation. I referred to some of the modern developments of tort law in response to new ideas and needs and pleaded for a careful study of these branch of law in India which would enable our lawyers to take a live interest in it and make their contribution to the work of remaking and refashioning it that is now going on in the U.K. and other countries which follow her law. We as a nation command considerable respect and prestige in the world today and we can continue to do so only by proving equal, if not superior to, other people in all spheres of knowledge and learning. My object in writing this article is to stimulate the interest of its readers in this subject and refer to some very interesting changes of a revolutionary character which would give the student of law and legal theory a great deal of the material for thought and reflection.

Two such revolutionary changes will be discussed in this article. They relate, first, to the rules relating to the liability of occupiers of houses and other structures for harm suffered by persons lawfully entering their premises, second, to the rules regarding causation as a factor determining tortious liability. As regards the first matter, the change is near accomplishment, as a Bill to alter the present law has been introduced by the Lord Chancellor in the British Parliament in the middle of last year. As regards the second matter, learned opinion in recent years in the U.K. and else where is favouring a drastic change which in view of the very unsatisfactory state of the present law on the subject appears to be likely to happen before long. The rules now in force have the weight of age and authority but have landed courts and litigants in so many difficulties that we now think it is time for them to go.

* Senior Advocate of the Supreme Court of India and author of the Law of Torts Eastern Law House Ltd. Calcutta and Madras.

§ Meeting, of the University College of Law Union held on 19th March, 1957, at 5.30 P.M. with Sir Justice J. P. Mitter in the chair. The Subjects of the lecture was Tort-law and its developments.

In this branch of law and in others there have been such phenomena in recent times. This is not surprising because this is an age of revolution,—revolution not merely in law, but in politics, in social policy and in other spheres of human thought and activity. Twenty years ago a man who talked of an Indian Republic would have been dismissed as a dreamer. Fifty years ago his sanity would have been doubted. Such would also be the case of a person who attempted to change the law by giving an equal share of the inheritance to wives and daughters along with sons in the estate of a Hindu. But these changes and events have come to pass and are now part of our environment as much as the landscape around us.

On the responsibility of occupiers of property, the law was laid down by Justice Willes, an eminent judge of the last century, in *Indermaur V. Dames*, (1866) L.R. I C.P. 274. In that case the plaintiff, a servant of a gas-fitter, employed by his master to do certain work in the sugar refinery of the defendant, fell through an unfenced hole in the floor and was seriously hurt. The defendant was held liable. The learned judge observed that the defendant's duty was to prevent harm from unusual danger and he as occupier owed this duty to a person who goes upon his premises on business which concerns the occupier and upon his invitation, express or implied. The judge held that the plaintiff was such a person and not merely a licensee who has permission to go into the premises. A licensee cannot complain of defects and if he does so, it would wear the colour of ingratitude, said the judge. In later cases judges expounded the law on the basis of these words and phrases used by Justice Willes. In doing so they formulated certain rules. The occupier owes different duties to three classes of persons, invitees, licensees and persons who are neither and are trespassers. The duty to an invitee as defined by Justice Willes is to prevent harm from unusual danger. The duty to a licensee is only to warn him about defects of which the occupier knows, and the licensee cannot know. The duty to a trespasser is to refrain from creating a danger or trap for him. So there came to be three categories of visitors and the duty to each category was crystallised in the above form.

For nearly a century now, courts in England have regarded these rules almost as if they were the sections of a statutory enactment and proceeded to apply them to cases as they arose. There are several reasons why this method of creating law is bad but it is necessary here to mention only one of them. A judge decides a particular dispute before him and if he discusses the law, his words should not be treated as having legislative force and sanctity. His eminence and learning are no guarantee that his words will afford satisfactory solutions on the varying facts of future cases. In this particular instance almost every word or phrase used by Justice Willes no doubt appropriates to the facts of the case before him proved inappropriate and inept in later cases. He spoke of 'invitation on business which concerns the occupier'. So the person invited was called the 'invitee.' No doubt in that case the plaintiff went on business which concerned the defendant. But can this definition be treated as exhaustive and can a person who does not go on business be relegated to the lower category of a licensee? One of the first difficulties arising from this definition was about a guest. He may have been invited for a dinner or a social visit but is not an invitee within the above rule. Therefore if he fell into the unfenced hole into which the plaintiff in *Indermaur vs. Dames* fell, he cannot complain.

This is rather shocking to our sense of, justice but that has been the law in England. Another problem was about children or adults entering a public park or swimming pool maintained by civic authority for public use. They have been held to be only licensees not invitees, because they do not go on business of the occupier. So if they are injured by a defect or danger in the premises, they cannot complain, because it is not the duty of the occupier to prevent such injury. This is obviously unreasonable and some judges have differed from this view. The result is conflict and uncertainty in the law. The same difficulty arose in a case where a sister of the tenant's wife who lodged with her in his flat was injured by reason of defective steps in the common staircase in a block of flats under the control of the landlords. The House of Lords by a majority of three judges against two held that she could not sue the landlord. Some of the judges held that she was not an invitee of the landlord though an invitee of the tenant. So the occupier owes own standard of care to the tenant and another and lower standard of care to the tenant's wife, friend or visitor.

The other part of rule relating to the nature of the duty to an invitee, which was stated to be to prevent harm from unusual danger. Some judges used the phrase concealed danger and contrasted this phrase with an obvious danger. All these phrases have led to serious difficulties and injustices. An instance is the decision of the House of Lords in *London Graving Dock Co. vs. Horton*, (1951 A. C. 737). The plaintiff, an experienced welder, employed by contractors engaged by the defendants in charge of ship, sustained injuries owing to the inadequacy of staging provided by the defendants and falling through it. He and some of his fellow workers had made complaint about it to the defendant's charge-hand but nothing was done though the danger would easily have been averted by the use of few more cross-boards. The House of Lords by a majority of three judges against two and differing from the three judges from the Court of Appeal, dismissed the Plaintiffs, action on the ground that the danger was not unusual as he knew it and should be taken to have accepted the risk. The judges conceded that in spite of his knowledge he would sue his own employers but not the defendants. This is an echo on the doctrine of privity which still persists in the law in spite of the authoritative disapproval of it by the House of Lords in *Donoghue vs. Stevenson* (1932). This decision strikes one as unjust and has been criticised as such by eminent judges and jurists. In the U.K. and elsewhere on the other hand it has been held by the Court of Appeal in a later case that the tenant's wife could sue the landlord when she was injured by a fall of a patch of ceiling on her, though she knew the bulge in the ceiling for some time and had complained of it to the landlord's inspector who had done nothing to remove the danger; *Green vs. Chelsea Borough Council* (1954) 2 Q. B. 127, C. A. The plaintiff was regarded as a licensee and therefore the consistency between this decision and *Horton's Case* in which the plaintiff was an invitee entitled a higher degree of care becomes even more striking. The result naturally is that the law is in a very confused state. This is not surprising because judges had pinned their faith on uncertain formulae and phrases which divert one's attention from the real issue. The real issue is whether the defendant's conduct was in the circumstances reasonable. Instead of facing this issue, the liability of the defendants is made to rest on the answer to the question

whether the danger is unusual one or obvious one. A danger maybe obvious or known to the plaintiff but the defendant's duty to prevent harm to him is not necessarily negated on that account.

These and other unsatisfactory features of this part of law have fed to the proposed legislation which it is said will sweep away the formula of duties of three classes of visitors and to substitute in its place the duty of reasonable care on the part of the occupier to the visitor according to the facts of the particular case. So a century-old dogma in the law of negligence will soon be laid to rest.

Another dogma of a much longer standing and more firmly entrenched in law was the legal liability of a person being determined by causation. A man is liable for the direct consequence, but not for remote consequence of his act or default. This is so elementary that every text book on the subject proceeds to explain it by a reference to authorities dating back Bacon's Maxims. Difficulties surround the theory when we begin to apply it to facts, and though judges have struggled manfully to grapple with the problem and finding some workable test for solving it, they have unfortunately not been successful. Different tests were adopted from time to time and abandoned later on. The variety of phrases and metaphors used to single out the legal cause or consequence is bewildering e.g. chain, rivers, transmission gears, conduit pipes, nets, insulators, *causa causans* and *cause sine quanon*, *no act*, *novous actus intervenienis*, effective or efficient cause. After more than a century of difficulty, conflict and confusion in the law of causation, the view that is now gaining grounds is that the question for a decision is not causation but responsibility. In other words it is not whether the defendant's conduct is the cause of the harm complained of but whether he should in justice be held liable for such harms by reason of his conduct. The latter is the real issue in action for negligence and on good can come from avoiding it and shifting the emphasis to the issue of causal relation. The causal relation is no doubt an important element in deciding the issue of legal responsibility but is not the basic issue.

Let us take some example. A drives his motor car rashly and knocks down B.B's injury is slight and he would have recovered from it in a few days, but unfortunately he had heart trouble and suffered from prolonged illness. Is A liable for such illness? Under the law now prevailing, A is liable. A by his rash driving knocks down B on the road and kills him. C is a spectator and got a shock which on account of his weak nerves results in a nervous shock and serious illness. Is A liable? The cases say that he is not. In both cases the antecedent abnormality of the person is a cause of his illness and suffering but in one case is the legal cause and not in the other. Taking the second case, we find in contrast with it, *Hambrow vs. Stokes* (1925) L K B. 141, where the defendant was held liable for the illness and death of a woman due to nervous shocking becoming frightened about the, safety of her children by reason of the defendant's servant leaving his motor lorry unattended in a street. Therefore the nervous shock arising from fright or alarm about danger to another may be a consequence for which a person may become liable by neglinent conduct. In this case the person shocked was

the mother who was near the scene of the occurrence. Supposing she was elsewhere, say, in another street or city and got nervous shock on hearing the news, can she recover? If it is to be a relation who can recover, who are the relations who can do so? The truth is that responsibility is not a mechanical or logical result of causal relation but is determined by consideration of justice and also judicial policy.

So in the pages of *Law Quarterly Review*, (1953) 69, L.Q.R. 433-5 Professor Goodhart draws attention to the need for a change in the basic approach to the problem of determining legal responsibility and we find a judge of the eminence of Lord Wright in support of it. In one part of the Law of causation, namely, contributory negligence the results of applying the rule of cause effect and choosing the plaintiff or defendant as the causative agency were so unsatisfactory and unjust that the rule has been abandoned and the principle of apportioning the blame among them has been adopted in England by the Law Reform (Contributory negligence) Act, 1945.

These great changes in Law are interesting not merely as legal phenomena but as phenomena in the working of the human mind. Ideas and policies as well as words and phrases hold sway of our minds like material empires and pass away and give place to new ideas.

A later generation wonders how the old ideas were ever entertained at all.

THE RULE OF LAW

The Hon'ble Mr. Justice D. N. Sinha

Calcutta High Court

There are two rules in this World, one the Rule of Law, and the other the rule of the Jungle. The rule of the Jungle is often mistakenly referred to as the 'Law of the Jungle'. As will presently be seen, it is no Law but the negation of all laws. In point of time however, the law of the Jungle came first, for mankind emerged into the sun from the dimness of his cave and the darkness of the forest. It was a long and dreary journey, and even to-day it is not easy to tell how far he has travelled along the way. For verily, man has two faces. The one which he generally sports to the world has the veneer of Godliness, but the other face he keeps turned. Could we but see it, we would turn with disgust, because it bears the devil's own stamp.

All that is primitive in man has long been submerged in the rising tide of his evolutionary ego; but even now, in the ancient depths of his subconscious, lurk fearful Monsters—Violence, cruelty, lust and greed. The Jungle has long been passed but its shadows linger.

The law of the Jungle, so called, is no law. In the depths of its gloom, every living thing stands for himself, and there is no sanction but the sanction of the tooth and the Claw. Within its boundaries, the weak is the legitimate prey of the strong. When darkness falls, and the miasmatic vapours arise to envelope the Jungle, everything is still and silent. Swift Padded Feet scurry under the shadows. There is a sudden scream of terror cutting into the chill of the night—a scream of agony, a death-struggle—and then silence again. And so the Jungle lives on, in terror and violence.

Long long ago, Man came out of this Jungle, into the sun, where the flowers bloomed and the birds sang and the terror of the night had been left behind. In his bright new world, life was no longer to be haunted by the tyranny of the strong, and death was not to lurk behind every passing shadow. Man is a gregarious animal, and soon found out that it was infinitely more pleasant to live in society, giving and taking and not merely leading an existence centred on self. Being emotional, he even conjured up an imaginary world where fear had been banished and Greed exterminated. Where the Lion and the lamb drank together at the Mountain Stream, and when you slapped your brother upon the right cheek, he turned to you his left. This he called his 'Utopia'.

And how did this evolution of mankind into society and social living become possible? Because Man was able to evolve another rule of living—the Rule of Law.

The word 'Law' has never been satisfactorily defined. Thousands of definitions have been offered, but not one has been found wholly satisfactory. This is because of the astounding boundaries of the law, which is as large and prodigious as life itself. It was a long time in human history before we had written or codified laws. For ages Man's conduct was governed by nothing more than the accumulated experience of his forefathers. From this originated the rule of Customs. In primitive Society, religious and secular rules were inextricably mixed, which later on hardened into a more rigid course of conduct moulded to suit the changing needs of Society. Legislation, which is the modern method of creating law, came last. To-day we are living in a veritable forest of legislation. So multitudinous are the written laws that no one but an earnest devotee of the Law can hope to have even a passing acquaintance with it. Indeed to be an expert in any branch of it, requires the expenditure of the best part of a lifetime. To the common man, the word 'Law' does not raise a pleasant image. He conceives it as a necessary evil which can not be cured and so must be endured. He imagines it to be a series of ruthless prohibitions which can not be disobeyed without peril of punishment. "The false conception of Law" says Pollock, "merely under the form of prohibition is largely due to the exaggerated prominence of criminal Law in the public eye. To nine lay folk out of ten, the word 'Court' suggests a Police Court first and to some of them nothing else at any time. "But Law has really no boundaries. Just as life has become complex, law has had to reach all its distant ramifications, and has indeed become vast and complicated. No longer it is sufficient to have the Ten Commandments engraved on stone. To engrave all the written Laws today will take a veritable mountain!

But the basis and foundation of all Laws is to preserve human life and human society. "Every Man" said Hobbes, "is entitled and bound to preserve the existence which God has given him". But upon that foundation, a complex structure has been built. In such a world no one can afford to be unconscious of the rule of Law. We must appreciate that modern life with all its complexity would be impossible if we did not constantly apply to it the discipline of the Law and its remedies. What should be the Law is the business of the legislatures which are the accredited representatives of the people. Law on the whole represents the common conscience of those who are subject to it. If it did not, it would not be obeyed, at least not in a free country. "It is generally true" says Pollock "that positive Law will only reflect current moral opinion. "He however points out that 'Ethical feeling and Judgment are not uniform throughout a complex and specialised community, but vary according to the education, surroundings and pursuit of different social groups, as soon as one passes from the rudimentary principles to their application." Modern law is highly advanced. But knowledgeable people are constantly pointing out its shortcomings. The first defect is its prolixity. "It will be of little avail to the people" wrote the Federalist, "that the Laws are made by men of their own choice, if the Laws be so voluminous that they cannot be read, or so incoherent that they can not be understood. If they are repealed or revised before they are formulated or undergo such

incessant changes that no man who knows what the Law is today can guess what it will be tomorrow. "And even with this voluminous body of Laws, we have not attained any degree of adequacy. "The commandments of the Law" says Pollock "come sadly short of being adequate. We lawyers know very well and may find very high authority for it if required, that life would be intolerable if every man insisted on his legal rights to the full". But whatever be the drawbacks of the Law we cannot do without it. "Man's struggle" says Justice Douglas in his Tagore Law Lectures, "has been to live under a Government of Laws and not men". If Law represents the Common Conscience the spirit to obey it must be carefully fostered. The Laws we have at present and the legal system that we follow, is a legacy of the British. Opinions differ as to the quality of the British as rulers. But there cannot be two opinions that they are an intensely law-abiding nation, and their system of Law is second to none. But what is worthy of emulation is the attitude of the British to their own laws. Having made a law, they think it logical to bow down to it and obey its behest. If the Law is bad or unsuitable, the constitutional remedies are set in motion and the law is removed from the Statute Book. A reverence for the Law and the Judiciary which administers the Law, is a part of his training in life and forms a firm trait in his character.

I say this with considerable regret, that in this country while we profess to follow the British system of Laws, we are doing nothing to inculcate in young men, this worthy attitude of the mind. On the other hand, there is a growing intolerance of all laws and all Constituted Authority. The time has perhaps come, when we should calmly ponder over the question and take steps to check its ugly growth. I am not for a moment suggesting that man should become servile to tyranny or a slave to despotic Laws. But we do not seem to realise that we are now an independent people and the proper way to deal with a Law that is unsuitable is to take recourse to constitutional methods for its repeal.

Unfortunately however, our young men are growing up with minds which are increasingly intolerant. Either we do not appreciate the advantages of the Rule of Law, or we are allowing unthinkingly, the Rule of Law to lapse. The latter would be a tragedy beyond recall! This subtle change in the ethical conception of our society is apparent in many ways. If you are driving a motor car in certain parts of the city, you will find young men standing on the road refusing to move so as to allow the car to pass. If there is the slightest accident, a holocaust follows and the life of the driver is in danger. We all read in the papers a short while ago of a most senseless case. A bus driver ran over a person, but escaped. All the subsequent buses were stopped and their drivers pulled out and beaten! One cannot think of a grosser case, showing the mentality that is developing. In another case, also reported in the papers a Government Official had reserved a compartment in a train for himself and his family. During the middle of the night some young men asked him to open the compartment to let them in, which he was not lawfully compelled to do. As he refused, a mob of several hundreds of people gathered, broke open the compartment and manhandled him.

Take the case of general strikes. I do not say that many of them are not for worthy causes.

But suppose you do not see eye-to-eye with the strikers in a particular matter, nevertheless, you are compelled to join, and if you do not, you are likely to be manhandled in the streets. Take again the question of Noise. The Rule of Law propounds that every citizen should be careful to see that his fellow citizen should not be incommoded by his acts. That is also the essence of social behaviour. In England if you put on your radio high and make a noise, your neighbour will at once phone the Police and you will have a call from them very soon and politely asked to turn off the noise. But what is it that happens in our cities? During religious festivals we completely forget that there is such a thing as the law of nuisance, and thousands of loudspeakers blare forth a non-stop cacophony of raucous music, day and night, until peace-loving people feel like going out of their minds. We often complain about the lack of civic amenities in our towns. But how can we have any amenities, if we do not have an elementary sense of civic behaviour? The municipal laws are openly thwarted. Refuse is thrown into streets, nuisance is committed everywhere. Everybody tolerates the encroachment of the pavements until they are veritable Bazaars, and nobody minds if our Bazaars are the repository of all kinds of filth and decay. It is unnecessary to multiply examples. What is required is the development of an attitude of the mind. Either we are developing into a strong, law-abiding nation, intolerant of the violator of the Law, or gradually deteriorating into a lawless type of people whose destiny leads back into the Jungle from whence we all came. It is for us to lay the pattern now. In the years to come, it might be too late.

In a short article like this it is not possible to develop the theme any further. But it will have served its purpose if it induces at least some of you to ponder over the problem and do some earnest thinking.

“This is the moral of all human tales.
It is but the same rehearsal of the past.
First Freedom and then Glory—when
that fails Wealth, Vice, Corruption, Barbarism at last;
And History with all her volumes vast
Hath but one page.”

Lord Byron

ROLE OF LAW IN A DEMOCRATIC SOCIETY

Sri Jayanta Kumar Mitra

First Year Student

It is the aim of democracy to lead human life to its fullest development. It has the tendency of conducting a constant trend of human affairs towards the perfectibility of mankind and moving forward towards the goal of greater prosperity. Prosperity includes not only an abundance of physical goods and comforts or assurance of economic and political security, but rich intellectual achievement, fullness of artistic and spiritual life and ample recognition of the exquisite and unique place of creative instincts and talents. For, it is beneath human dignity to become a mere cog in a machine; and all inventions and discoveries, transmissions and communications which tried to make the world a closely knit community contemplated by Mr. Willkie¹ had the ultimate motive of helping man to cultivate his personality. The cultivation of tastes, individual perceptions and aspirations are the results contemplated when Mr. James Russel Lowell speaks of giving mankind "a common nervous system."

Now, liberty is the condition of this development. If a man feels that he has been bogged down in the apathy of regimented thought or that he has been deprived of certain rights essential to the cultivation of his intellect, his individuality can never flourish. If, on the other hand, he is not denied the right to communicate his thoughts and at the same time, if he be a citizen whose opinion counts, his personality is protected against the worst repressions.

This fact, therefore, leads us to the contention that every person should be given to enjoy the maximum of liberty. But, this is a confusing riddle—for, how can maximum freedom be bestowed on a person without infringing that of another? One of the thorniest problems of modern men is to harmonize liberty of the individual with the liberty of all and to strike a proper balance between them.

Out of this enigmatic question arises the popular controversy on the utility of a state and the interference of governmental actions. When Tom Paine cries out—"every government is a necessary evil", he looks at legal rules as an undue abridgement of individual liberty; on the other hand, Dr. Bosanquet upholding the state as the "hinderer of hindrances" emphasized on the role of law essentially to bring about an "ordered freedom" giving everybody his respective opportunity for self-development.

Without unnecessary roving into the labyrinth of this intricate controversy, this much can

be mentioned that when different people with different tastes, aspirations and perceptions live in a society, there are certain uniformities of conduct that should be maintained. Robinson Crusoe on a deserted island may defy the natural instincts of a man; but for others, granting of maximum liberty will inevitably lead to chaos and confusion. "The theory of philosophic anarchy," says Professor Laski, "is impossible as long as men move differently for the attainment of different ideals."² For, at some point when the spontaneity of their behaviour ceases to be practical enforced acceptance in a common way of action is necessary.

Law, thus, does not curtail liberty of the individual; it channels liberty through proper course so that every individual may have sufficient recourse to it, thus procuring for the society the benefit of development of human personality to the maximum possible extent. For, as very deftly epitomised by Hon'ble Mr. Justice C.E. Hughes, "Civilisation itself is progress in multiplying restraints to conserve opportunities."³

Law, therefore, is something more than an artificial and external element imposed on a society—it is an effort that arises from within. "Law", says Cicero, "arises out of the nature of things."⁴ The source of law is not the power that enforces it, but the effort that gives it life. Grotius also expressed the same view when he pointed out that upon the broad principles of natural justice which is universal and irrefutable, the theories of municipal law are formulated. Hence, it is in the instincts of a normal person to abide by law. "To invalidate this law is never morally right, nor is it permissible to resist its operation, and to annul it is wholly impossible."⁵ The reason is as follows : majority of the people want justice and that constitute the harmony of their will "Justice is the cement of society",⁶ and standing behind the law, not infrequently provides the key to its interpretation. Pascal very truly pointed out that both reason and force are essential in the proper concept of law; actually its true voice is the voice of reason, not that of any earthly magistrate and its true force is the force of inherent necessity, not that of artificial machinery.

Specially, in our own days, the field of law has been vastly enlarged. Immense increase in population and congestion in towns and cities have extended the scope and possibility of the clash of interests. Gradual industrialisation and economic development have changed people's perspective of morality and ethics. The strive for development and the desire to become rich are gradually altering their values. For, how can the Hindu ideal of self-mastery and renunciation of desire go hand in hand with the desire to become rich? And in the process of development these countries will undoubtedly lose much of their beauty, stability and piety.⁷ The concept of 'economic man', whether be it liberal view point of the Hedonists or the more ambitious variant of the Marxists, will inevitably corrode the ideal of integral humanism.⁸ Law, adopted according to the needs of particular circumstances, is the only machinery to make it a central point of concern to retain a whole picture of human individual for whose benefit economic development is necessary.

Moreover, democracy has its own capacity for tyranny; and it manifests through increasing power and interference of the state in almost all social activities. We cannot ignore the insidious

encroachment under the guise of official discretion—"the armoured car of bureaucrats which runs so freely without showing a head to hit." Unauthorized seizure of papers and other materials, suppression of opinions and defilement of secrecy, arrest without showing cause are a few instances of the effect of uncontrolled increase in the power of the state. While it is quite appreciable that proper use of organization must be made so as to facilitate purposes that are essentially social, too much zeal for organization may result in the frustration of vitality of the society and denunciation of freedom of the individual; and who can say whether limitless extension of it shall not result in the inculcation of intolerance against those who betray differences, thus polluting the very source of social solidarity? Just as without government regulation liberty of the individual is crushed by uncontrolled economic forces; under extreme socialism it is crushed by political power functioning in the economic field.⁹

It has often been complained by the laissez-faire politicians that law brings about complexity in regulation in a society. But, law actually controls the individuals in a society; and there is a difference in the meaning of the two terms. For the minimum complexity in regulation a pre-imposed control is necessary and the establishment of control streamlines regulation. The absence of law in a society can be compared to a motor car without a driver, where the passengers keep reclining over the steering-wheel to give it twists and complex regulations regarding the degree to which each may turn the wheel are provided so as to prevent them from fighting over it. A well-ordered society with an efficient legal system has a driver, so these regulations are unnecessary.¹⁰

Law balances the various social forces in a nation which are fighting for supremacy. This fight is natural. The rule of law, therefore, does not prevent this fight; but it provides rules for combat and thus maintain unity of the state in spite of conflicting aims of different groups.¹¹ It is, therefore, in a complex society like ours, necessary to maintain the state as a centre of political co-ordination with law as its machinery; in the absence of such machinery and hence co-ordination, society will lapse into disorder and from disorder it will react back into overcentralized totalitarianism.

Notes :

1. "One World" by Wendell L. Willkie; published by Cassell and Co. Ltd., First publication, 1943.
2. For an excellent exposition of the problem, interested readers are requested to consult Prof. Harold Laski's "A Grammar of Politics".
3. "Law and Liberty" by Hon'ble Mr. Justice C.E. Hughes, in "Lawyers' Treasury".
4. "Republic III" of Cicero, translated by Sabine and Smith.
5. Grotius's view had been quoted by Prof. Sabine in "A History of Political Theory." Page 424.
6. "Democracy and the Individual" by Prof. C. K. Allen, page. 61.
7. "Development for Free Asia" by Maurice Zinkin, see Chapter 2 ("The Price of Development").

8. See the excellent article "Industrialisation and Integral Humanism" of Prof. Amlan Datta in his "For Democracy".
 9. "Law and Liberty" by Hon'ble Mr. Justice C.E. Hughes in Lawyer's Treasury'.
 10. I beg apology to Prof. A.P. Lerner for using the metaphor coined by him though in a completely different context. See his "The Economics of Control" or "The Economic steering wheel" University, Review June 1941.
 11. A remarkable article by an anonymous writer in the "Law Quarterly Review", April 1943.
-

COMPULSORY ACQUISITION AND PUBLIC PURPOSE

D. Narasa Raju

M. L. Advocate General, A.P.

The functions of a modern State are not confined to maintenance to Law & Order, Protection of the country against foreign aggression and promotion of international amity but embrace many more aspects, to name but a few, promotion of public health, public morals, commerce and industry, economic development, and more than everything else, progress and prosperity of its citizens. Welfare State is the war cry. That is why the executive power of the State, under the Constitution, includes entering into contracts, carrying on trade and business and everything else that falls within its legislative competence. The demarcation between functions which are strictly Governmental and those which take in other activities is fast disappearing. In actual practice, however, it is realised that while Departments of Government may attend to strictly Governmental functions, it will conduce to more convenience, efficiency and better administration, if the non-Governmental activities are entrusted to Corporations. That is why we have Corporations such as, Life Insurance Corporation, Air Lines Corporation, Road Transport Corporation, State Trading Corporation, Finance Corporation, Mining Corporation, etc. The Government concerned may hold all the shares or the majority of shares but nevertheless exercises effective control over the management of its affairs. For legal purposes the Corporation is a distinct juristic entity but in point of fact it is an agency or instrumentality of the Government created to carry out a policy and achieve a purpose.

Trade and commerce and industry which at one time the monopoly of private enterprise are in several essential or important fields taken over by the State. State monopoly is no longer regarded as an unwarranted interference with the individual right to carry on business but is considered as expedient in public interest, of-course the framers of the Constitution did not envisage the complete exclusion of the citizen from any field of trade or business when the U.P. Legislature sought to nationalise Bus Transport and passed an Act for the purpose authorising the total elimination of the private citizen, the Supreme Court held that the provisions of the Act resulting in the exclusion of the citizen constitute an unreasonable restriction on his right to carry on the business. The constitution was therefore amended in 1951 introducing a proviso in Art. 19(6) which enables the Union Legislature to make a law authorising the exclusion, total or partial of private citizens from any particular trade or industry.

Several States have been taken advantage of the amendment and have been launching out on schemes of nationalisation. In spite of this increasing tendency to nationalise and to assume direct control and supervision in the field of industry, still a large domain is left to Private enterprise and the Private Sector. Naturally there is an impetus to the promotion of public limited companies engaged in the production of, not only equipment and machinery, but also of various consumer goods, as for example, vanaspati, Sewing Machines, Soaps, Blades, Automobile parts, Textiles, Paper etc. Each State is anxious to induce the Capitalist or Industrialist to establish the industry in its own area as it would necessarily tend to employment of labour, increase in trade or business and economic prosperity. Almost the first requirement of any big company is a huge plot of land for construction of factory, labour colonies, staff quarters, etc. Therefore the State agrees to give all the necessary facilities to the company after satisfying itself that the establishment of the industry is for public benefit. The owners of land sought to be acquired resist compulsory acquisition as, by such a step, they are deprived of the bargaining power and when the Government issues the notification under the Land Acquisition Act, they take proceedings in Court challenging validity of acquisition and even impute lack of bonafides to the Government concerned suggesting that the notification is inspired not by solicitude for public interest but by a desire to help a few individuals and enable them to make big profits. One such problem came before the Supreme Court in the Aurora Case. The owner of the land complained "why should my land be taken away without my consent and against my will just because the Government is anxious to help the company. The Government can not convert itself into the land agent of the company. May-be the Company produces goods which are useful to the public but that is not enough. The public should have the right to resort to and use the premises or buildings proposed to be constructed." The argument for the Government and the Company was that the proposed buildings serve a public purpose in as much as the goods produced are required by or are useful to the public and Government in notifying the land for acquisition is acting in the public interest and not as land-agent of the Government. The Supreme Court by a majority held that on a correct interpretation of the provisions of the land acquisition Act (Sec. 40 & 41) it is essential that the members of the public should be entitled as of right to use the premises as in the case of a hospital or public park. Justice Sarkar, however, pointed out in his dissenting judgement that it is enough that the products of industry are useful to the public and that it is not necessary that public should have the direct right to resort to or make use of the premises of the buildings of the Company and that was how the Act had always been understood and the acquisitions made by Government for Companies. The decision created a stir all over the country and several Governments found that the notifications made by them were in danger of being declared void and that the Companies concerned which had made huge investments would find themselves in a quandary. Shortly after this judgment of the Supreme Court another case came before it from Punjab. In that case the Government issued a notification that the land was needed for a public purpose, namely, the establishment of a factory for Refrigerators. The cost of acquisition was about

4½ lakhs and the contribution of the Government out of public revenues was Rs. 100/-. The acquisition was attacked as ultra-vires and malafide. The Supreme Court held that the declaration made by the Government that the property was needed for a public purpose is conclusive unless it can be shown that it is a colourable exercise of power and if the purpose ex-facie is no purpose at all or can never conceivably be related to a public purpose. Repelling the argument that contribution of a nominal sum of Rs. 100/- towards cost of 4½ lakhs was a fraudulent exercise of power, the majority held that the previous decisions had always taken the view that any contribution, however small, would be enough and that by itself can not establish abuse of power and that therefore payment of Rs. 100/- out of public funds would make it an acquisition by the Government for a public purpose as distinct from acquisition for a Company.

The result of the two decisions was that where a notification is issued by a Government that the property acquired is needed for a public purpose it would be sufficient if the Government makes nominal contribution to the cost of acquisition though in fact and truth the entire cost is borne by Company but if the acquisition is for a Company but if the acquisition is for a Company it is necessary that the public should be entitled to use the buildings or the premises as of right. It was in this anomalous situation that the Union Legislature stepped in and amended the provisions of land Acquisition Act. The effect of the amendment is that in the case of acquisition for a Company, if the undertaking is for a public purpose it would satisfy the requirement of law. The amending Act in substance gave effect to Justice Sarkar's dissenting view that the test of public utility is the proper test. What then is public purpose? Public purpose whether acquisition is for the Government or for a Company must mean the same thing. In its comprehensive and modern aspect, public purpose is synonymous with public benefit or usefulness to the public. Nobody would deny that production of goods essential to the life of the community is a public purpose. But opinions may vary in regard to goods which are styled "luxuries" as contrasted with "necessaries". But what is a "necessary" and what is a "luxury" is relative to the items we live in. And there is no definite objective and uniform test. Hundred years ago if any one claimed that a motor-car or a radio or an electric light, a refrigerator, or cosmetics for the matter of that were necessities he would have been laughed at. To-day if any one asserts that they are luxuries he would be laughed at. An aeroplane is a "necessary" if the litigant public are to have the services of eminent lawyers or if the nation is to have services of the Statesmen and Politicians. The nation cannot afford to have their nerves rattled or temper upset or time wasted. Similarly Cinematograph equipment and picture production are essential to the life of the Community because without the Cinema most young women and men and even adults would not perhaps be able to know what to do with themselves. Therefore the concept of "necessaries" is elastic, progressive and relative. Even if the real purpose of the Company is to make profit and distribute rich dividends nevertheless the undertaking is for a public purpose, if it is catering to the needs of the public and the products of industry are in demand. Even if the goods are not meant for local consumption but intended

A VENERATION TO SIR ASUTOSH MOOKERJEE

Ratna Chatterjee

2nd year LL.B.

“What Bengal thinks to-day, India thinks to-morrow”. The expression perhaps resembles grim, illogical and possibly a mockery on the face of Bengal as it is to-day, but in fact the entire development of India, owes to a larger extent to this tiny province. Undivided Bengal made a very remarkable, historic progress in the field of intellectual renaissance. In the first half of the sixties, Bengal gave birth to quite a number of illuminating genius with turbulent speed and progressive outlook to form a new constellation in culture in the next century. Asutosh Mookerjee was undeniably one of them. Since the initial inception of his life he was courageous, heroic, steady and cultivated a fierce love of independence. This he often displayed in thousand and one occasions of his public life. A man apparently very strict, adamant in his performance but inwardly a man with a very broad open heart—a heart for all, a thoughtful heart agonised always for the cause of the students.

Possibly he was the first champion to think of creating another NALANDA at Calcutta. He dreamt to collect all the good seeds of both national and international sphere and under their most valuable and able guidance the future colonels of the country would be prepared by batches. The undeniable fact that any country to exalt her position gradually, needs immensely the help of genius, oarsmen of ability and versatile qualities. He tried to shape the theme into reality. Unfortunately, the country unlike other regime could not give him unstinted support and a free access to act independently. He faced innumerable obstacles but it was his undaunted valour that crowned him with success. He created a Post Graduate Department in the Calcutta University in 1917, filled it with all possible brilliant scholars from the far flung corners of the country. He set up a chair for Pali and under his able craftsmanship Bengali was introduced in the Post-Graduate Course. He realised that the vitality of education should be learnt best only through the media of mother tongue perhaps was concretely advocated by him and his personal participation in the mission gave sufficient impetus to follow the same path in other universities too. The entire enlightenment of the education system helped immeasurably the middle class in India in the period of national upliftment. He was never a man absorbed in politics but his contribution in the political forum was nevertheless not negligible. To-day, India's language problem is a hoax and the country finds tremendous hardships to progress speedily discarding the influence of any narrowness. He imbibed the issue

of the linguistic integration of India as a nation and eventually created a national literature by introducing the study of Indian languages at high academic levels. He opposed vehemently the enactment of the University Act, which was unfortunately passed and came into force on 1-9-1904. But in the capacity of Vice-Chancellor of the Calcutta University he deftly defeated its restrictive intents. His nationalistic biasness could be observed in his refusal to abide by the direction of the then Lt. Governor of Bengal, Bamfylde Fuller who was extremely eager that the Syndicate should withdraw recognition from some schools whose students had already taken part in political forum. Fortunately enough Lord Minto, the Viceroy and Chancellor of the Calcutta University backed up Asutosh in this and Fuller resigned himself. To-day, during the centenary of this great man of the country we feel very sincerely that what a great degree of deteriorations we are having in the line of education. We have now innumerable Universities but "not nearly enough teachers of quality; for the States, a University has become a "Status Symbol". When Education Ministers both at the centre and in the States think nothing of dangling carrots and brandishing sticks before the Indian Universities, it is salutary to remember the man who fought for academic freedom at a time when bureaucracy was all powerful and resistance carried few rewards. Sir Asutosh Mookerjee owes the country no apology for placing education above agitation in those early years of the century; perhaps those who have debased academic standards since owe him one."

The trend of education that we are having presently indeed cuts a very sorry and sad plight. If the prevailing defective system of education continues, with its destructive octopian limbs, we then simply live in memoirs of our glorious past and welcome an unwanted adverse future.

Rabindra Nath Tagore:—"Men are always rare in all countries through whom the aspiration of their people can hope to find its fulfilment, who have the thundering voice to say that what is needed shall be done; Asutosh had that magic voice of assurance. He had the courage to dream because he had the power to fight and the confidence to win—his will itself was the path to the goal."

Bipin Chandra Paul—"Sir Asutosh Mookerjee is the most complex character that I have seen...this complexity is I think, responsible for the widely divergent estimate that diverse people have formed in him. He has enthusiastic admirers. He has persistent detractors. But there is one matter in which both his admirers and detractors seem generally to agree and it is that he is by far the most powerful public character of his generation."

REFLECTIONS ON CIVIL RIGHT

The Hon'ble Mr. Justice P. B. Mukharji

Dean of the Faculty of Law, University of Calcutta

Civil rights are the burning topics of the day. As whatever burns emits smoke there is perhaps more smoke than light over this issue. The modern world of law and jurisprudence is greatly disturbed over the problem of civil rights. Attention has been focussed on the problem more acutely by the recent events in the United States of America. Immediate obsessions and current pre-occupations have often prevented a truly dispassionate analysis of the nature, philosophy and law of civil rights. The best that can be said about the law of civil rights is that it is unsettled, precarious and volatile. Robert M. Huchins said in 1952—"The number and vigour of opinions, to say nothing of the number and vigour of dissents, suggest that anything may happen when a case involving civil liberties gets before that Supreme Court."

A century after the American Civil War the struggle to protect and even enlarge civil rights in the United States continues unabated. The problem still remains controversial. It is embittered on the one hand by impatience with the slow process of law and judicial machinery and on the other by a racial mis-understanding and inter-racial prejudices, restricting the broader and more comprehensive view of the Civil Rights. The misfortune is that Civil Rights are discussed and disposed of only in terms of minority rights or racial rights. The truer and larger context of Civil Rights is out of focus.

The American problem of civil rights developed under the context of a struggle between the rights of the black and the white among the citizens of the United States, resulting in a constitutional pursuit of a system of inter-racial adjustments within the framework of law and constitution. The Black Codes enacted by the Southern States after the Civil War to withhold full and equal freedom from the Negro and the reactions of the Reconstructionists, the Civil Rights Act of 1875 and the American Supreme Court decisions of 1883 on the Civil Rights cases represent the highlights of the American problem of civil rights. The present southern demands for "voluntarism" and "moderation" in the struggle for racial equality are current features of the American problem. Mr. Theodore Leskes's recent "Study of State Law against Discrimination" and Mr. Konvitz's modern work on "A Century of Civil Rights" discuss the problem of legislation enacted by the States following the American Supreme Court decision in the Civil Rights cases of 1883 which held that discriminatory acts by individuals were within the domain of such legislation. The efficacy of laws that State legislatures have adopted to

ensure a public policy against discrimination for reasons of race or colour in public accommodations, including laws commanding fair employment, educational and housing practices, has recently been the subject of close scrutiny.

About a century ago President Abraham Lincoln issued his celebrated Emancipation Proclamation of January 1, 1863 which freed the slaves in the Confederacy. That original liberating impulse, within a few years, was driven underground. The silver lining in the cloud to-day is that the great impulse still expresses itself vigorously and actively. The American legal and constitutional system is valiantly fighting in defending this impulse and make it practically fruitful. In the modern age when new African and Asian nations are progressing with breath-taking speed the American Negro justifiably does not feel gratified by the fact that six years after the American Supreme Court decision that school should be desegregated with "all deliberate speed", only about six per cent of the Negro pupils in southern and border States attend integrated schools. At that speed one hundred years will be required to achieve integration. The progress has been pitifully slow. Of the eleven States that were in the original Confederacy no integration has taken place in five of them after six years, and no more than one per cent has been achieved in the other six. But all these American concepts of "integration", "segregation" and "desegregation" in the context of American Civil Rights are mistakenly elevated as racial questions. I have never understood this racial accent in the American approach to civil rights. For to my mind America in one sense is the least raceconscious State in the world being a country whose origin and evolution mark it as the inveterate mixture of many white, brown, tan and yellow races, between whom there are no burning question of civil rights. But somehow America is allergic to Black. It is that colour complex which has discoloured American Civil rights.

The problem of civil rights requires a clear definition of what civil rights are. I am pleading for a more realistic and comprehensive view of Civil Rights.

Civil rights are not necessarily racial rights. Racial rights become civil rights when different races constitute the same citizenship and same nationality under the same political State. It is in that sense not a racial or inter-racial question but a question of civil rights of the same citizens under the same State but belonging to different racial or minority groups. For instance, India has no black and white problem. The racial question is for all practical purposes, absent in India. Racial differences within the ambit of civil rights therefore do not disturb the Indian political, constitutional and legal system to the same extent as they do in America. In the extended connotation of civil rights which I am putting forward the question however is supremely important in India as in America although its expressions are different.

In fact in my view of Civil rights, they are to-day a world problem in the modern multilingual, multi-racial, multi-religious and multi-cultural States of this age. An entirely new outlook on Civil rights is demanded by these modern States. Civil rights are not only racial or linguistic, or religious or minority or communal or even constitutional rights, but also all other rights that flow from the membership of a modern State. They demand rethinking on the

fundamental questions about the pupose of human life, State and organised society, the changing relationship between the changing man and the changing State, the conflict between freedom and security. This means a new political philosophy and new techniques of government and administration. Conventional approach in terms of races, and religious is inadequate. The bigger approach in terms of ways of life and thought is becoming indispensable. It is a mistake to approach Civil rights either from the point of racial right alone or from the traditional point of view of only minority protection. Civil rights are all, the minority, and the majority as well. They are basic for the good life in a State. They are universal. Minority or racial rights are only a part, not the whole of Civil Rights. The racial or the minority accent in the passionate debates on Civil rights in the legal, judicial and political chancelleries of the World has succeeded only in humiliating the majority by false slogans of artificial qualms of moral conscience and thereby necessarily creating a widespread resentment at the unjustified claim of races and minorities to be fighting a moral cause. Civil Rights should be broad-based enough to deserve and maintain the loyalty of all.

A brief conspectus of the Indian Constitution will show a glimpse of the nature of civil rights in India. The preamble to the Indian Constitution upholds justice, liberty, equality and fraternity among the people of India. That contains the germ of civil rights. The Chapter on Fundamental Rights of the Indian Constitution develops the idea of civil rights in greater detail. Article 14 ensures that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Article 15 provides that the State shall not discriminate against any citizen on grounds only of religion, race caste, sex, place of birth or any of them. In particular, this Article of Indian Constitution insists that no citizen shall on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels and places of public entertainment; or the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public. In order to prevent oppression or handicap for what are known as the scheduled castes and scheduled tribes in India power is acquired by the State to make special provisions for their advancement, specially in cases of socially and educationally backward classes of citizens. This principle of "protective discrimination" as a constitutional theory and constitutional practice is unique. I shall presently make a more detailed reference to it. Article 16 provides for equality of opportunity for all citizens in matters of public employment to any office under the State. Article 17 abolishes the social evil of untouchability and forbids this practice in any form. The celebrated Article 19 of the Indian Constitution confers the right of freedom to all citizens in respect of speech and expression, of peaceful assembly without arms, of associations or unions, of movement throughout the Indian territory, of residence and settlement in any part of India, of acquisition, holding and disposing of property and of practice of any profession, occupation, trade or business. No doubt, State has reserved the power to put reasonable restrictions on such freedom in public interest. The Indian Constitutional theory

of “reasonable restriction” of civil rights is not exactly a variant of the American “due process of law”. India’s Fundamental Rights in two Articles 21-22 of the Indian Constitution are for protection of life of a person. They also provide for the right against exploitation of man, labour and child, right to freedom of religion and in particular cultural and educational rights. These cultural rights are important civil rights in India and are contained in Articles 29 and 30 of the Indian Constitution. They proclaim that any section of the citizens of India having a distinct language, script or culture of its own shall have the rights to conserve the same, and that no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State fund on grounds only of religion, race, caste, sex, place of birth or any of them. They expressly provide that all minorities whether based on religion or language shall have the right to establish and to administer educational institutions of their choice, and the State shall not on any ground discriminate any of them on the ground that it is under the management of a minority, whether based on religion or language. India’s Bill of Rights also confers the right to constitutional remedies and access to courts.

In the year after the Constitution in 1951 the minorities represented a fairly large problem for civil rights in India. Out of a total Indian Population of that time of 357 millions, the Muslims were 35 millions, the Anglo Indians 1,100 the scheduled tribes 19 millions and the scheduled castes numbered 50 millions. Apart from minorities of religion and culture, inferior social and economic status marks the main features of the backward classes, who are subject of civil rights. Religious minorities, cultural minorities, linguistic minorities and backward and under developed classes are the four special problems for civil rights in India.

This will not be an appropriate place to discuss different aspects of civil rights as appearing in the many decisions of the State High Courts and the Supreme Court of India, for such an attempt will be more appropriate for a research Article, I shall pick up an Indian constitutional novelty from an illustrative case law. In the well-known case of *V.V. Giri vs. D.S. Dora* A.I.R. 1950 S.C. 1311 a fundamental issue is raised namely, to what extent should effect be given to discriminatory provisions favouring scheduled castes and tribes as regards their representation in Parliament. Discrimination in favour of the scheduled classes in Parliamentary representation is an exceptional case justified only by the existence of special conditions in India. Indeed the Indian Constitution contemplates the disappearance of those conditions in a short time when the discrimination will be abolished. Compare the provisions of Article 334 of the Constitution. In the case just cited the trouble arose over a Parliamentary constituency in the State of Andhra Pradesh which is a double-member constituency, with one seat reserved for scheduled tribes and the other was for general. Four candidates A,B,C, and D were nominated from the constituency to fight the election. C,D belonged to the scheduled tribes. At the election votes secured by the candidates were in order D,C, A and B. D secured the highest number. D was elected to fill the reserved seat and C, the general seat. A filed the Election Petition challenging the validity of C’s election. His main contention was that he had offered himself as a candidate for the reserved seat and as such he was not entitled to be elected for the general seat. The

alternative argument was that having once made his choice to contest the reserved seat he could not subsequently fall back upon his right to be elected for the general seat. The Supreme Court of India however rejected A's contention and decided that merely because C had claimed the benefit of the reserved seat he should not be precluded from contesting the election for the general seat. The principle that weighted with the Supreme Court was that although the constituency was a double-member constituency, that did not mean that there was a separate electorate or any separate constituency for the scheduled classes and that the same joint electorate goes to the polls to elect both the candidates. This decision is cited only as an illustration of the nature of civil rights involved in the minority problems in India and their political representations and specially as an example of the Indian constitutional theory of protective discrimination as against destructive discrimination. It exemplifies that persons belonging to the scheduled classes may confine themselves to the reserved seats alone but as citizens of India they possess in an equal measure all the rights conferred upon other citizens and can equally contest election to general seats as well.

In authorising preferential treatment for the backwards classes on the basis of membership in backward groups, India is making a great experiment with the method of ameliorating group differences which would perhaps come under constitutional prohibition in dealing with minority problems in the United States. *See Commonwealth of Pennsylvania vs. Board of Directors of City Trust* 77 Supreme Court 806. The American observer is familiar with these processes designed to outline discrimination but will find this principle of protective discrimination novel and strange. This principle of protective discrimination is a legacy of the British judicial and legal system in India. Towards the end of British period in India, preferences and arrangements for distribution of power and benefit according to membership in communal groups, were legally accepted methods for the distribution of the political balance of communities as well as for the amelioration of the conditions of the backward classes. The Constitution of India, in the light of that experience emphasises the use of this principle of protective discrimination for the improvement of the backward classes.

This principle of protective discrimination demands extensive research and close study. The extent of preferences cannot be easily outlined. The Constitution gives no indication that the State need at all reserve any minimum number of posts in public government services or seats in public educational institutions nor divert any minimum part of its resources to their benefit. Preferences are not mandatory but only permissible. The Constitution does not lay down any maximum or minimum limitations on reservations. The Supreme Court in *Venkataram vs. State of Madras* 1951 S.C.J. 318 upheld reservation for Harijans and backward Hindus of four out of fourteen posts. In *Keshab Ayyangar vs. State of Mysore* A.I.R; 1956 Mysore 20 the Mysore High Court upheld a reservation of 7 out of 10 posts. The scope and operation of scheme for preferences are also debatable.

This theory of protective discrimination has raised peculiar problem about its scope and operation. Articles 15(4) and 16(4) of the Constitution provide for special consideration for

Backward Classes, the former applying to the State in all its dealings, while the latter is limited specially to the field of Governmental employment. The generality of the meaning of “any special provision in Article 15(4) and “any provision” in Article 16 (4) makes it wide enough to extend “reservation” to include preferential rules of recruitment, educational qualifications, age, etc. The unusual situation arose in *Raghuramalu vs. State of Andhra Pradesh* A.I.R. 1958 A.P. 129 where admission to State medical school was denied to Backward Classes candidates, although their scores were higher than candidates in the “general competition” on the ground that the 15% quota of reservation for Backward Classes had been filled up. The court however saved the situation by interpreting that the reservation as a ceiling on admission must operate in favour of, and not in derogation of the Backward Classes. Thus if the Backward Classes secure more seats than are reserved for them, the reservation cannot be used to limit them to a prescribed number. At the same time the courts in India have discouraged coddling with the “protective discrimination” and have ruled that members of Backward Classes are not entitled to compartmental system of selection which transforms a “reservation” into a guaranteed number of seats in addition to those obtained by merit. See *Puppala Sudarsan vs. State of Andhra Pradesh* A.I.R. 1958 A.P. 569.

This principle of protective discrimination as an operating principle in defence of civil rights is however limited to three categories, (1) Scheduled Castes, (2) Scheduled Tribes and (3) socially and educationally Backward Classes. The difficulty however is that the Constitution does not define these groups and peculiarly enough the Constitution does not provide any standard by which they may be determined. In respect of Scheduled Castes and Scheduled Tribes the President is empowered to specify, after consulting the Governor of a State those “castes, races, or tribes and tribal communities” or parts thereof who for the purpose of Constitution shall be deemed to be Scheduled Castes and Scheduled Tribes. Once specified, these lists however can not be varied except by an Act of Parliament. Preferences for a fourth group, the Anglo Indians, are expressly provided and reserved posts in certain services and special grants to Anglo Indian education are guaranteed by Articles 336 (1) and 337 of the Constitution. But the larger group of socially and educationally Backward Classes is not only not defined by the Constitution but there is also the difficulty that there is no agency, like the President, to determine what that Backward Class is. But then Article 340 of the Constitution provides for the appointment by the President of a Backward Classes Commission, but only to investigate the conditions of such classes, the difficulty under which they labour, and to recommend steps to remove such difficulties and improve their conditions. This Backward Classes Commission was established in 1953 and the Commission listed certain standards with reference to trade and occupation, security of employment, educational attainments, representation in Government services and position in social hierarchy. It did not however apply the standards directly to isolated classes of Backward persons but made an attempt to isolate Backwards communities. The units to which these standards were applied were for the larger caste and subcaste groups. The whole problem of differentiating a class characterising

backwardness is full of legal, constitutional and ethical difficulties. If standards of castes, religion or sect is to be applied they may lead to conflict of civil rights. It may be noteworthy to mention that the Indian Supreme Court in Venkataramana's case rejected the inclusion of Muslims and Christians as Backward Classes and was silent as to the permissibility of the religious standard to define Backward Classes. The problem of civil rights as not to accentuate the differences of groups in castes, religion and tribes. An overemphasised minority orientation for Civil Rights creates strange results. For instance, bigamy is an offence for the Hindus, who are the majority out not so for the Muslim minority in India. This discrimination is defended on the plea of protection of the religious susceptibilities and customs and habits of minority. But if monogamy is a desirable ideal for the majority, and an accepted ideal for the secular State then this distinction is an indefensible practice of Civil Rights. This is only one example. There are many others whose analysis here time will not permit.

There is a distinct and definite change in the modern outlook on civil rights all over the world. That change is not always liberal. Particularly after the Second World War there has been a decisively illiberal attitude. Legislative and executive action is tending in the direction of narrowing, curbing and in some cases even abrogating political and civil rights. New factors and new forces have been gathering strength since 1940. The present attitude all over the world seems to be to put a halt to the expansion of civil rights and their content. The basic principles of true democratic processes have not been assailed. But the economic, social and political climate created by the Second World War appears to have changed against civil rights. The present age is an age of great stress, conflict and tensions. The new factors responsible for this change in the climate are both internal and external. The vast industrial complexity and expansion, the rapid progress of under-developed continents and countries, the increase of population, the advance in technology, the rise and challenge of the science and concentration of economic units, the speed of life and habits, the sophistication of existence, and an altogether impatient mood of the mind of modern man, have all radically and fundamentally altered the role of Government and the State. Far reaching State controls inevitably accompanied by enlargement of Governmental bureaucracy, the persistent and perpetual efforts for meeting unfair and oppressive actions both of political as well as of economic machinery have made the modern society so complex that standardization and conformity are the ruling ideas of the present time. Standardization and conformity are not conducive to expansion of civil rights. They leave little room for flexibility, tolerance and respect for differences. Maintenance of civil rights has therefore come to require not only a battle against Governmental power but a struggle against oppressive Governmental majorities. Paradoxically enough in such a battle the individual of the minority group is forced to look up to the Government for succour, and against whose increasing power he looks in turn for the defence of his civil rights.

This is not the whole picture. Techniques of political organisation and political appeal have radically affected the problem of civil rights. The development of private associations of great power in almost every phase of national life, the growth of highly integrated and closely

disciplined political parties, almost monolithic and streamlined, and the inevitable totalitarian techniques, have all their effect in prejudicing the cause of civil rights. Enormously difficult problems of national security in the atomic age have imperilled both the theory and practice of civil rights.

The crucial question before the world is, whether under new conditions of the modern world we shall continue to maintain not only our faith in civil rights but also our liberal practices of them within the processes of democratic freedom or whether the world will turn back upon the civil rights to adopt the tyranny of control and restrictions of spiritual, moral, mental, intellectual and academic freedom, as a price for defence against overt and covert treachery and subversion.

What strikes me as significant is that in this time of crisis the techniques, training and discipline of the legal method must play their responsible and important roles in defending, maintaining and upholding the values and the ideals of civil rights. In my view, two related legal institutions must play their significant part in maintenance of civil rights. One is the Constitution of India which embodies in practical form those guarantees of individual and minority rights and those restrictions on the exercise of Government and executive power as the very soul of democracy. In India this problem is of the utmost importance. Lament has been expressed that within the first fifteen years of the Constitution, all the amendments have encroached and not enlarged civil rights, in sharp contrast to the American constitutional amendments which are all in favour of the expansion of the civil rights. But then the liberal American constitutional amendments in favour of Civil Rights may be balanced against the pursuit for un-American activities and hunt for loyalty oaths. A new democracy of such vast proportions as India, need to be more cautious than the smaller but older and more experienced constitutional democracy of the United States under a written constitution. But then it proves how the world events and the world climate of the present age are against liberalising civil rights. The second legal institution that must play its part in this critical juncture is the judiciary and its power of judicial review. The courts as the guardian and the final arbiter between the rights of the individual and Governments, of minority and the current majority, have a supremely responsible and difficult task to discharge. Great judicial statesmanship is needed for the solution of these current problems of law and statecraft in the field of Civil Rights.

Civil rights in both under-developed or developed democracies demand great political judicial statesmanship. The clamour for rights has embittered many if not all relationships inside the State. But rights cannot be divorced from obligations. The constitutional jurisprudence all over the world has been anxious to protect and guarantee civil rights. Whatever is protected and guaranteed becomes weak and rickety in course of time. Civil rights are no exception. Many of the constitutions in the world have their Bill of Rights. I have yet to see a constitution which provides for a Bill of Obligations. If rights can be enforced, defended and maintained and upheld in courts, I am waiting for a day when the basic obligations are equally enforced under judicial sanctions. If that day comes then there perhaps may be a saner balance between rights

and obligations. Otherwise the pendulum will swing from left to right and right to left. Expansion of civil rights continued under a liberal climate from the 19th century to the first decade of the 20 century. Two World Wars and the fear of another in this atomic age have made the pendulum swing towards the right. The balance is not necessarily in the hands of law and the constitution. It is a moral, ethical and a spiritual attitude, whose resources must also be summoned in defence of civil rights. Without them and without the aid of such resources no legal or political guarantees can preserve civil rights in the modern world. The entire theory of legal sanctions to enforce Civil Rights is primitive and suicidal. If armies and riots are necessary to enforce Civil Rights then I am afraid we are pursuing a self-defeating process. Of all legal and constitutional concepts in the world's libraries of Jurisprudence, the one of Civil Rights has the largest ethical and spiritual content. It is wrong to treat Civil Rights as a mere legal or constitutional conundrum to be solved only by courts, lawyers and political agitators. They represent the very basic values of human civilisation and its aspirations for a Juster Society for mankind. If it is not blasphemy to refer to the Bible on this topic, I shall say that Civil Rights demand an affirmative answer to the ancient, modern and recurrent question, "Do I love my neighbour as myself". If not, then I am not practising Civil Rights. Let us not miss that simple truth in the modern noise of juristic and political controversies on Civil Rights.

LET SCIENCE HAVE A LOOK AT INTERNATIONAL LAW

Bhupen Nath Mukerjee

Barrister at Law, Vice-Principal University College of Law, University of Calcutta

Beginning of International Law

Lawyers love to call Hugo Grotius the father of International Law; to the scientist, *De Belli ac Pacis* (1625) was but a new phase in a process that must have had its beginning at the dawn of human intercourse in which Machiavelli—the Chanakya of the West—had represented yet another phase a century earlier.

As soon as there is more than one group of humanity in close proximity to each other with a sense of more or less equality of status, there arises a possibility of peaceful intercourse between them leading to a pattern of approved behaviour which we should be obliged to call International Law. That a sense of equality of status is an essential precondition is clear. You don't enter into a treaty with a barking—or even a biting—dog, do you? But you soon seek an arrangement with your quarrelsome neighbour, or your nagging wife, or your selfish husband; because, they are your equals. This explains why the highly civilized monotheistic Jews never made International Law with their polytheistic neighbours, whose women and children they butchered during war with the same ease with which we kill a fly. The Greeks too made International Law only with those who took part in Olympic Games and followed the traditions of the Iliad and the Odyssey, but never with the Non-Hellinic people whom they called the barbarians. Even highly rational men like Aristotle would calmly reason that Nature intended the barbarians to be slaves. Why is this irrationality among rationals? There is no ready-made answer; but science can lay facts bare, which may lead us to a better understanding of the problem.

Our Background of Long Savagery

Although man has lived on the face of this earth for at least 500 thousand years, civilization even in the most rudimentary sense dawned only five or six thousand years ago. For the most part of this long period, that is, say, 495,000 years, therefore, man must have gone naked and speechless without cooked food to eat and with only cold caves to lie in. Following the suggestion of Prof. James Harvey Robinson, if we reduce this vast stretch of time into a manageable size by taking one year for every 10,000 years for our convenience, we should find that man's life on this earth is now on its fiftieth year. On this time-basis we can make

a comprehensible mental picture of our past. There is scientific justification in saying that man has taken 49 years just to develop cultivation, domestication of animals and weaving of crudest garments. He has taken nearly another six months to invent writing; a further three months for literature, art and philosophy; two more months for Christian religion with Hinduism and Zoroastrianism preceding it; two more weeks for printing press; and one week for steamengine. In the next two or three days came the steamship and the railways of the world. Electricity came yesterday. Aeroplane and submarine are, of course, only a few hours old; and the spaceship has come up just a moment ago.

This extra-ordinary mental picture is indeed amusing; it also gives us an important lesson. The primitive ideas, habits and sentiments of this long savagery have very likely become so ingrained that they possibly have moulded man's very nature by 'natural selection' through the principle of Darwin's, 'the survival of the fittest'. That is, those of the human individuals who could adapt most completely to that rough, rude and uncritical culture, must have prevailed upon more critical, sensitive and refined ones, and passed on those savage traits to us through genetical laws. This really means that our immediate forefathers were (and, therefore, we are) less intelligent, less critical, less sensitive, and less refined than they (and we) could have been but for this long, pristine and precarious existence of man and the biological consequence that flows from it. With this background of ourselves in mind let us proceed to observe the recent developments in International Law and our role in them.

Recent Trends In International Law

The end of the Second World War saw three significant developments in the international field which are to bring about revolutionary changes in the nature and function of International Law. These are : liquidation of colonialism; birth of 'new' sovereign States in Asia and Africa; and unprecedented growth of material science as war machine.

The first two made International Law truly international and global. The entire human race—white, yellow, brown and black—are brought to the same status and caught for the first time in the all embracing network of one Law of Nations. The diverse tongues and the divers voices, as it were, have joined in one symphony. And to carry the musical analogy a little further, there are notes both of concord and discord but they all blend in one grand symphony of the Law of Nations.

For the first time in its evolutionary history, the Law of Nations has deliberately admitted the silent claims of the vast living masses of humanity as distinct from the vociferous demands of their political States. For the first time also, the living man—the individual—has been made the subject of International Law along with his State (e.g., Nuremberg and Tokyo trials). Even a cursory comparison of the preambles of the Covenant of the League of Nations with the Charter of the United Nations would show this international recognition of men as opposed to States. The League Covenant, for instance, starts by "The High Contracting Parties...", and in contrast to this, the U.N. Charter begins in the name of the "Peoples of the United Nations...".

Furthermore, the promotion of respect for Human Rights and Fundamental Freedoms, which had hitherto been left to the individual States, is indeed a new and hopeful, element in the U.N. Charter. It is a great moment in the evolution of International Law that it dives beneath the surface of State politics and discovers the living men—"the nurslings of immortality"—who alone are the cause and justification of its very existence.

The third significant development of our age has however, not been so propitious. It is the devastating advance of natural science. The advance has been so great and so rapid that the meaning of man's life no longer matches the marvels of his labour. In this science we have created a Frankenstein which is about to obliterate humanity before it consumes itself. For this, we can blame neither science nor the scientist. You should not try to stop progress; in fact, you cannot stop the forward march. Science must march on, as time marches on. A stop-watch would only stop the watch; but not time, nor science.

What is then the reason behind man's losing control over his science? Our efforts to study man, his natural equipment and impulses and his relation to his fellows in the light of his origin and the history of the race, have remained singularly feeble. In these social sciences we know as much, or perhaps a little more, today than Aristotle knew in his day; whereas in natural sciences—Physics, Chemistry, Mathematics, Engineering and Technology—the intellectual giant of Greece is left nearly 2,500 years behind us.

There are good reasons for such unreasonable preference for material sciences over social sciences. Our conservatism about ourselves is one. We can patiently listen to the most revolutionary theories about astronauts and atoms, but we grow impatient—if not, violent—if a social scientist is to criticise our social conduct, our sexual behaviour, our cherished beliefs and our exalted superstitions. Further, the chemist or the physicist of today encounters no such opposition as he did in Galileo's time; on the contrary, he gets moral support and material encouragement, especially from that class of our society which, since the industrial revolution rule the country in every land. They are, to use the language of that great soul, Sree Aurobindo, the Vaisyas—the business caste. In other ages a military or a religious caste enjoyed similar pre-eminence. Today the businessmen do. The Sudras or the workers may be the next to take this pre-eminence. Whatever may be the other consequences of this one-sided scientific development, one thing is certain that International Law will not achieve its final aim of Peace with Justice until the human power is brought to bear on the psychological forces released by modern science.

Hidden Forces Released By Science

The forces that have been thrown up as a result of scientific development have lodged themselves in man's imagination and are corroding his mind. These are : business-profit mentality, unlimited democracy and unmitigated nationalism.

Science and Technology boosted up commerce; and commerce excites struggle for riches. This struggle is of a new kind; the ferocity and violence of our ancestors now find expression

in cunning and fraud, giving rise to unequal contracts and fraudulent dealings. Our laws are well adapted to check robbery and rapine, but are yet unable to curb artifice and fraud. Previously; men made houses for living in and grew wheat and rice for food; but now we make them for profit, grow them for profit, sell them for profit, hold them for profit and even destroy them for profit. Yes, all for profit. Is there any doubt that the recent popularity of the cold storage system in our country is primarily for profit, and that the preservation of food is only secondary?

Unlimited democracy had cost at least one valuable life in ancient Greece—the life of Socrates; the charges of corrupting the youth and infidelity to the gods were but excuses. Thomas Jefferson contemplated an agrarian republic for America, and longed for the rise of a natural aristocracy with virtue and talents for government; but mechanical revolution shattered his hopes and attracted all sorts of people to the rapidly growing cities whose streets and buildings are now crowded to suffocation. The story is everywhere the same. The men in town appear all alike : they live alike, they dress alike, and they eat alike. They take the same chance of being inflected with the germs of cholera, typhoid and smallpox, and run the same risk of being run over by automobiles and omnibuses. This is democratic equality in action—equality by levelling. Here lies the germ of publicised democracy; and the crowded cities are its breeding centres. We—or, rather our leaders—have made democracy public before making it known. Knowledge requires education; but publicity can be without it. So, we have democracy without education! We never pause to consider its validity, never search our hearts about the virtues of indiscriminate levelling. It is fashionable nowadays to swear by this democracy. But do we really like levelling? The truth seems to be that though we are keen to level down those who are above us, we do not like levelling up men from below. The continued existence of separate Bar Libraries for Advocates and Mukteers in the country after the unification of our Bar under the recent Advocates Act should be an eye-opener to those who still believe, or would like to believe, in levelling of unequals into equality.

The third incidious force is the idea of nationalism, which came in with the decline of feudalism in Europe, and assumed strength and exclusiveness of sentiment during the nineteenth century. Originally, it was a by-product of sovereignty and was once a legal and innocuous national principle of France. But even before the advent of the nineteenth century it had acquired notoriety, mainly because of the pretended patriotism which so many people in all ages and countries—not excluding our own—are prone to use as a cloak for self interest. Thus we hear Dr. Samuel Johnson announce in a determined voice, “Patriotism is the last refuge of a scoundrel”; and Dr. Johnson, we need have no doubt, knew his Shakespeare well to remember : “Who is so vile that will not love his country”. The point is that, nationalism served its purpose well in the past; but today it is a burden on the international community, especially when it is practised with aggressiveness, whether it be by Chou En Lai or Verwood or Ian Smith. Newer the nation, the greater its zeal for nationalism. It is the ancient tribal insolence pure and simple, developed to a stupendous scale; it reminds us constantly and inexorably of our savage past.

The Future

The question then naturally arises : What is the future of International Law?

There are two ways, says Bertrand Russell, in which one can talk about the future—the scientific and the utopian. Since a utopian view is nothing better than wishful thinking, it should be avoided. Rigours of science, on the other hand, leads to scepticism when pushed to its logical conclusion. And scepticism is as removed from reality as utopianism. In fact, they are the two extremes of our reasoning process. Therefore, scepticism should also be avoided. That is why Justice Holmes, said, “The life of the Law has not always been logic, it has been experience.”

Experience of the past does not endorse pessimism for the future. When the entire past history is viewed as one process, as it must, a continuous upward surge of life towards ‘vision’ and ‘control’ is discernable. If ‘vision’ is now lagging behind, it is but a passing phase. When science has released unprecedented powers, she can also deliver the means of control. What is needed is fearless thought, exhaustively lucid statement, mercilessly criticised plan and honest execution.

International Law has taken a new turn. It is beginning to concern itself more and more with the welfare of humanity over the heads of States. States are, of course, jealously guarding their own rights over their subjects, though not so zealous in discharging their obligations towards them. Governments of today boast of being popular governments, alleged to be supported by the people; but they fail to support their own people with bread when the people are supporting them by their votes. The liberation of human individuals from the shackles of competing State system involves at least partial sacrifice of state sovereignty. But an act of abnegation requires enlightenment and, therefore, has to await the advance of the common mind of man that lies petrified in primitive ideas hardened by long years of savagery.

The two cardinal ideas on which the birth and growth of International Law depended, and upon which most of our political life—both national and international—is now turning, have been moulded by the long savagery of the human race. These ideas are : ownership or proprietorship and internationalism, i.e., a sense of belonging to a larger community than one’s own visible world.

“The idea of property”, says H.G. Wells, “arises out of the combative instincts of the species. Long before man was man, the ancestral ape was a proprietor. Primitive property is what a best will fight for—the dog and his bone, the tigress and her lair”. This is ownership blazing. You can safely discard any theory of ‘primitive communism’. It is scientifically as untrue as an egg does not bounce off a concrete floor. Atkinson in his ‘Primal Law’ has shown this most convincingly. In fact, society from its beginning is a mitigation of ownership. Ownership in the primitive savage was far more intense than it is with us; it is rooted more strongly in instinct than in reason.

There have been some attempts at its mitigation. Strangely, however, these attempts came

from two diametrically opposite directions. The first was for the protection of private property, and the second was for its total abolition. They both aimed at the same end—namely, liberty and happiness of man, the individual; and both have so far failed. The reason for their failure is that they failed to apply scientific analysis upon the concept of Ownership. It was only recently that they realised that Ownership is not a single thing—it is a complex of different values and consequences. There are a large range of things which should not be owned except universally, such as, Railways, Roads, Machineries, Mines and so forth. But there are certain other things which are profoundly and incurably one's personal property. You cannot nationalise my toothbrush, my clothes or my cricket bat, or even my gardening implements. If you do, I shall neither have liberty nor happiness.

As regards the idea of Internationalism, although the savage was more conscious of 'we' and 'they' than we are today, our mind is still very primitive. Our eyes are turned inwards because we are prejudiced, and in some cases, also victims of vested interests. We do not see contemporary events with our eyes but with our prejudices. Although events are making for internationalism, we are still aggressively nationalistic and cannot rise above patriotic suspicions and jealousies. If we are bold enough to open our eyes, we should see that each year in many respects and in an increasing range of affairs mankind is becoming one community. In the growing economic and financial unity, the present fragmentary and contentious administration of affairs by the States are wasteful and dangerous. Population, food and infectious disease are now of world wide significance. There cannot be local solution of any of them.

Governments and States as we know them are after all provisional things; They may have to be modified to meet the change and expansion of human needs—this is scientific reason; and to put the kingdom of reason above nationalism is not a denial of patriotism, but its apotheosis.

It is not suggested that there should be one World-State or a World Confederation. The drift of thought today seems rather in the direction of a number of specialised organizations with world-wide powers delegated to them by Governments. And these organizations are increasing in number and expanding in jurisdiction. What is actually being urged here is that, the common mind of the race be made to realise the idea of essential human unity, by giving it universal instruction and understanding. Once reason is strengthened the zeal for nationalism will cool.

It is commonly said that the world has become smaller as a result of science and technology. This may very well be true; but it, by itself, poses no problem for us. Our problem is that, the shrunken world has actually inflated our mental horizon almost beyond our capacity. For our mental comprehension, the world has grown too big, and not too small. The visible world of our savage ancestors has grown into the invisible space for the modern man. The change of leadership in Russia, the Presidential election in America, the independence of Malay and the atomic explosion in China—all these crowd in into our little heads as much as the disappearance of baby-food from our local markets and the rationing of rice in our cities.

The conclusion is, therefore, irresistible that, the people must be made to understand that

they now live in one human family and that they should conduct themselves as members of that family. The only way to do this is by education; education, not in the sense of training in any particular art, science or craft, but in the sense of liberal instruction for broadening the mind. For once the mind of man is boardened, International Law can then play its part of establishing peace with justice. Before that, a word of caution : we can plan education' as we may; but its execution is all that matters. It is well said that, "Wisdom might plan, but virtue alone could execute".

LAW AS AN ANTIDOTE FOR THE FRAILTIES OF HUMAN NATURE**Shri Bijitendra Mohan Mitra**3rd year (LL.B.)

Civilisation is perhaps tinctured with blemishes because of the frailties of human nature. It derives its sustenance from the full-flowering of human personality. But, very often, human nature is found to be tainted with perversions. It is, indeed, difficult to construct a good house with bad bricks. Law can play a great role to curb the lapses of human nature and to guide his external conduct. So, the value of law as the basis of civilisation was recognised even in the dim far-away past. In this respect, law is as old as civilisation is. Historical researches provide us with various explanations of the origin of law. But the idea of organised society is inseparably linked up with some socially recognised principles. In the words of MacIver "Law in its broader significance reigns everywhere; where life exists there are universal laws of life". Law has undergone a process of evolution with the passage of time. Law, as is understood in the field of political and social life of to-day, has assumed importance of great magnitude. It is the cement of society. As man is saddled with a sense of responsibility, he cannot make himself free from the shakles of law in social life.

Human nature is really mysterious and the psychological complexity creates the problem and all its difficulties. Modern Psychology is still in a stage of infancy and cannot account for all the vagaries of human nature. Man, very often, behaves in a strange fashion and many of his activities cannot be explained rationally. Though Aristotle said long before that man is a social animal but this social creature has many anti-social propensities. If he is given the license he will perhaps indulge in many licentious acts which will have harmful effect on society. So, law serves as useful deterrent to prevent such possibilities. The might of the State is always there to serve as one of the most effective sanctions behind law before which people are forced to bow down. Law is intimately connected with the idea of justice which is to be maintained by external pressure. Even in advanced societies of recent times, man is still prone to behave as missionless machine within the structure of the gigantic machinery of the State organisation. For example, still to-day, we find people in our country taking every opportunity to cause lawlessness. They do not even hesitate to destroy public property on every pretext of slightest provocations. The emphasis on punitive aspect is still dominant in order that law can remain effective. Now, it is generally agreed upon by leading intellectuals of the time that prime purpose

of law should be reformatory. The purpose of law can only be served when anti-social man fit in with the society by its application on him. Modern civilisation is yet to achieve the positive aspect of law which will rehabilitate the man who has gone out of the social track. Criminal Psychology often demands viewing upon criminals as patients who require sympathetic treatment. In that way they can be cured of maladies of mental maladjustment. Victimisation may turn a criminal into a sad prey to a chain of wrong actions committed out of sheer despair against the society. Even to-day in most cases, a criminal is like a hunted hare within closed walls which in the mad attempt to escape only dashes its head against hard stones. Punishment cannot be the only key to cure moral and mental depravity. In dealing with criminals still punishment is the chief agency of the effective operation of law. So, law very often fails to grapple with such depravities of human nature. If criminals cannot be reformed, they will pose positive threats to the welfare, betterment and integrity of society. Law can inflict punishment to the wrong-doers and it can be effective in preventing them from wrong acts for a temporary period but law fails to offer any safeguard of recurrence of such acts in future. A crime is an injury to the society. So, the injured society in return inflicts punishment to the criminal for the greater interest of society. The interest of society can be served to the fullest extent if effective steps are taken to prevent the recurrence of such onslaught. In this way, it will serve the interest to a greater extent and then alone can law ascend to a higher pedestal to combat with the frailties of human nature. It is high time that element of retaliation in punishment should be held at a discount. Such conditions perhaps require a daring venture on our part when law can make room for psychological assessment and sympathetic considerations for the criminals. The purpose behind law in inflicting punishment is to root out crime and not to take vengeance against the criminal. But still in human society the hands of law are primarily directed towards the criminal. This practice is the direct refutation of the oft-quoted religious maxim of Christianity "Hate the sin, not the sinner". Many, in order to champion the greater interest of society, do not show any concern for the criminals as well as way wards. But it must be borne in mind that such indifference may also hamper the social interest if they are not improved. Then their very existence will be a source of danger. Their evil influence will always tend to spread like epidemic and can vitiate the fabric of society. If we are to go through the ladder of civilisation, then, law must encounter with daring experiments to evolve itself.

Another important function of law is to maintain and promote justice in the society. Justice has a sobering influence. Injustice often leads man to path of despair. The atmosphere of justice generates a sense of social responsibility. It is often the fountainhead of many of the good qualities of the members of the society. Law should give protection to the victims of injustice. Law can be an effective weapon to do away with many of the frailties of human nature if it can always champion the cause of justice. Therefore, law and justice should go side by side. But, very often, the currents of justice are submerged under the hard pressure of the rigidity of rules and procedures. In dealing with human problems law should develop a human approach

rather than being chained in technicalities of procedural methods. Too much adherence to rules and procedures may frustrate the ends of justice. The doubt is rampant in many quarters that law cannot always secure justice. So, law must be raised from the stage of artificiality if it is to serve for the welfare of humanity.

So, in conclusion, all must agree with the title of this discussion as chosen by the humble writer that law must be an antidote for the frailties of human nature if we are to proceed through the ladder in order to achieve a better society. If law is to take a great role to bring about new order of things in human society, it must evolve itself and choose daring paths. Still, law is far from being an antidote for the frailties of human nature. In spite of it, there is no reason for despair. Law must go through a process of trial and error. Let men wander into woods of error and this will ultimately lead them to the gateway of a brighter future. Law as antidote for the frailties of human nature may be interpreted as speculative flight into the region of utopia. But, utopia of to-day can become the reality of to-morrow. After all, optimism is the mother of progress.

THE ROLE OF THE JUDICIARY IN THE GOVERNMENTAL PROCESS

The Hon'ble Mr. Justice P. B. Mukharji

Calcutta High Court and Dean of the Faculty of Law, Calcutta University

This will analyse the scope and limitations of judicial power, the role of the judiciary in giving continuity of life and expression to the Constitution and the relationship between the judiciary and the legislature and the judiciary and the executive.

I

WHAT IS A GOVERNMENTAL PROCESS?

The implicit assumption in the subject as stated has misleading connotation. The Judicial Process is not in ideology and methodology a Governmental process. It has not the involvement of Governmental and Government Departmental processes. It has neither the bias, nor the commitment, nor the isolationism of a governmental process. In methodology unlike the usual governmental process, it is not inquisitorial but accusatorial; it is not a soliloquy of the Government with itself on files and notesheets. It is a dialogue, very often a multilogue with divergent contending interests, attended with publicity, pronounced with publicly stated reasons, where canons of construction, tradition and precedents and whose methods of investigation and sifting of facts are far more rigid and overwhelming than are those associated with what is narrowly and technically understood as Governmental process. The judicial process is a mentor, and where necessary, a censor of all other governmental processes. Governmental processes change with the change of governments. The judicial processes and the Courts, if they are to retain their independence, do not change with the governments. No doubt the judicial process and the Courts through which such process works are parts and creatures of the State and of its powers within whose aegis they work, they are nevertheless not in the usual sense administrative adjuncts or a part of the government or the governmental process. The judicial process though itself not a governmental process in the usual accepted sense, yet controls and corrects governmental and administrative processes.

II

SCOPE OF JUDICIAL POWER

Judicial Power is a concept of many dimensions, operating at diverse levels. It is difficult to

define and eludes the grasp of neat logic and formal categories. As a study in contrast, it is pitted against executive and legislative powers. As a study in methodology, it is the whole process of adjudication and decision. As a process of finding facts and truth under the din and debris of tensions, contradictions, conflicts, assertions and denials, the judicial power employs its own technique of evidence, procedure, examination of witnesses, opportunity of hearing contending views and versions. As a mission, it seeks and tries to do justice. Its great merit is that it is a power without bias or previous commitment and is a function of balancing interests. This power is both instinctive and dialectical.

The scope of judicial power expands or contracts according to the political philosophy or political science of the State within which the judicial power has to function. In totalitarian States with monolithic absolutism, the judicial power shrinks to the minimum and that minimum even works as the minion of political power. In liberal democracies the judicial power reaches its amplitude and Zenith. The judicial power is the barometer which registers the rise and fall of independence and freedom in human society.

Judicial power is directly concerned with disputes, rights and obligations between (a) man and man, (b) man and society, (c) man and the State or the Government and (d) States and States, or nations and nations. It extends over individuals, families, institutions, public and private corporations, companies, firms and associations and diverse kind of public and private relationships. Its impact is on life, liberty and property. It can punish, reward, encourage, compel, prohibit, direct, control, create and extinguish.

Judicial power can only be exercised through an actual lis or actual litigation. It is only through such a lis, it can be kinetic or else it remains static and potential. The Judicial power, unlike other powers in the State, has to be moved in every individual case. It cannot move by itself or in obedience to public clamour. It is moved by actions, proceedings, writs and methods of judicial review.

From this it follows that those who move the judicial power must act with some basic responsibility for a genuine public or private grievance. Attempt to move the judicial power for political or collateral purposes makes nonsense of statutes and laws and perversion of the Constitution and leads to waste of judicial power.

In liberal democracies, judicial power has travelled beyond its traditional home and environments. It has now an enlarged fourfold content in (1) decisions on constitutional controversies which are charged with political aspirations, (2) statutory interpretation by the Courts of many new types and patterns of legislation and statutes proclaiming unorthodox views of the service and welfare States, (3) Judicial review of laws and governmental action and (4) judicial review of not only the lower and subordinate judiciary but also of the diverse species of administrative and other tribunals and agencies. The vast and unprecedented growth of administrative laws has paradoxically increased the scope, content and impact of judicial power although their primary object has been to lighten the burden of the ordinary Courts.

While the Constitution has enlarged the scope of judicial power beyond their orthodox

limits, legislation in financial, fiscal and taxing areas, and in labour economic and technological areas has added new dimensions to judicial power.

III

LIMITATIONS OF JUDICIAL POWER

The limitations on judicial power are both extrinsic and intrinsic, though it is not easy to draw the line between the two. These limitations are not always fixed and may become variable.

The judicial power is not concerned with the policy of the law or the statutes which is said to belong to Parliament and legislatures. The judicial power does not formulate legislative policy but explains and propounds it by interpretation and construction. That is its first and paramount limitation.

Public movements and public controversies as such are not within the frame of reference of judicial power. It can only resolve an actual conflict between specific litigants and definite parties. It does not deal with the mass or the mob. It does not decide public grievances but decides specific complaints. That is its second limitation.

The judicial power is always *ex post facto*. It intervenes after the event and even, in *quarta* actions. It is in its nature archaic because it decides a past act or event. It is therefore neither messianic nor prophetic. It cannot anticipate. It is emblematic and symptomatic. Without a particular emblem or a specific symptom, it is powerless. It is necessarily occasional in its very nature and not perpetual in its current. That is its third limitation.

Judicial power operates *inter partes* and acts in *personam* and in the very limited spheres such as status and testament where its voice is in *rem*, it is at best a personal proclamation and not a public fiat for general application. *Res judicata* silences parties and their representatives but not those who are not parties. This is the fourth limitation.

The judicial power not only creates law but is created by it. It is itself the creature of law and statutes and is therefore bound by their terms and conditions. As part of such law, judicial power is normally bound by its own precedents and stark decisions. This is the fifth limitation.

The judicial power also accepts the limitations of the well-settled principles of natural justice and its own machinery and processes of discovery, investigation and evidence to find out truth and justice. That is the sixth limitation.

The judicial power is not political power and practical awareness of the difference between the two is a limitation on judicial power. The judicial power can only act on given materials and cannot create matter, event, or situation. Judicial power is therapeutic and curative. Political power is prophylactic and creative. The limitation of either is that the one should not usurp the function of the other. From this it follows that the political power is elective and represents the voice of the people. But the judicial power is non-elective and in that sense non-representative and reflects the conscience and not the voice of the people and acts more as a

brake than as the Chariot. The judicial power is the guars and the control of the political power. It therefore does not act as the superlegislature or the superexecutive or as the third estate but as the vital link and the dynamic harmoniser of the different organs and conflicts in the State, government, and society. This is its seventh limitation.

Judicial power is hierarchical and graded with original, appellate, revisional and superintending powers. They provide its own checks and balances and the judicial power accepts the limitations of its self-correcting processes.

IV

JUDICIARY'S ROLE IN GIVING CONTINUITY OF LIFE

Though the judiciary acts spasmodically as and when an occasion arises, yet paradoxically enough by so doing it weaves the texture of continuity of life in State and Society.

Neither parliaments nor legislatures are permanent. They come and go at every General Elections at periodic intervals. The judiciary is permanent. It is the standing symbol of continuity in the midst of flux. It does not depend on votes nor has to yield to the cry and craze of the mob and the passing hour. It is the eternal sentinel therefore of the continuity of life and the general custodian of law and order in society.

Statutes are disjointed. They are disunited. They are often contradictory. They are topical and never thematic. They are therefore sectional, isolated and never total. It is therefore the necessary role of the judiciary to interpret and construe the divergent statutes to render law whole and continuous, by harmonising contradictions, by bridging the gaps of isolation and by providing a continuous context and a consistent theme. The judiciary is thus responsible for maintaining continuity of life in law and legal order. Statutes are mere words. The judiciary gives them meaning and force in their actual impact on life. Parliaments and legislatures breed statutes but it is the judiciary which has the responsibility of bringing up and training that young breed into responsible, meaningful and effective family of mature legal adolescents, united to the common purpose of continuous service and welfare of the State and the Society.

The judiciary prevents the disruptive forces, both statutory and behaviouristic in State and Society and thus help in the continuity of life, habit and structure. An apparent sharp break created by statute throwing out of gear, patterns of values, thoughts, conduct and action is made more bearable in their impact by a reasonable judicial interpretation to make the transition not only lawful but truly effective. The high tension current of passion that passes into the Statute in the turmoil of Parliament and legislatures is reduced to serviceable voltage for maintaining and illuminating the great continuities of life and thus justify the basic and primary claim of law to lend a reasonable certainty to life and its maintenance. Dangers averted are neither remembered nor recognised nor recorded. One day perhaps history will record on how many occasions and where the judiciary has brought nations back from the precipice of revolution, disorder and anarchy.

The judicial mind, the training, the judicial methods of investigation and adjudication

and in fact the whole judicial outlook help in this great task of maintaining the continuity of life. It is helped in this process by the judiciary's regard for past precedents and a general reluctance to upset them, a comity between Courts, which inspire of conflicts, express surprising consistency and unanimity throughout the world and by its respect for tradition, history, forms and customs which have stood the test of time and by a rational obedience to *cursus curiae*. Of the three organs of the Government, the legislative, the executive and the judicial, the judiciary is the most conservative, the executive is the most diehard, the legislature is the most precipitous. The judiciary is not ashamed of this desirable conservatism for continuity of life and demands it as an indispensable postulate for a legally ordered society.

The judiciary has a discretion, sometimes large and sometimes limited and restricted, but is never without it. Very often it is to that discretion to which the judiciary turns when its conscience revolts at the undue exaggeration of expediency and emergency at the cost of norms. That discretion and its wise use help to maintain continuity and restrain disunity. The judiciary is the apostle of applied law and liberty and not like the rest theoreticians about legal freedom and legal philosophy.

The maintenance of continuity of life is not however its only function. It extends and enlarges the expressions of life, their content and limits.

V

JUDICIARY'S ROLE IN GIVING EXPRESSION TO THE CONSTITUTION

The Constitution is the supreme law of the land. All other laws have to conform to the Constitution. All action, conduct, statutes, rules and orders have to be in conformity with the Constitution. The Constitution is the legal sovereign. It is the only frame of reference within which our world of law, government and administration has to function.

Prima facie the Constitution is liable to be interpreted in the first instance not only by each of the three organs of the Government, the legislative, the executive and the judicial but also by every individual and person, because they have to act according to the Constitution. From that point of view there is no section of private and public conduct and administration which can claim any monopoly of exclusive interpretation of the Constitution. The Constitution is open to the constant and recurrent interpretation of the whole nation.

But the judiciary is the final interpretation of the Constitution. In case of conflict of views and doubts among the different interests in the nation, it is the Judiciary which is the ultimate arbiter and the conclusive voice on the interpretation, scope and meaning of the Constitution. Of necessity that is so. Therefore judiciary's role in giving expression to the Constitution is supreme.

The doctrine has been variously expressed in constitutional jurisprudence. It has been said in America, the American Constitution is what the nine judges of the American Supreme Court think it to be. In India it has been said that the Indian Supreme Court and the High Courts are the guardians of the Constitution.

The legal and constitutional implications of this doctrine have many special and normally unnoticed features. Judiciary is not only exponent of the Constitution. It is not so much the guardian of the Constitution as the arbiter of the disputes under the Constitution. There are many other areas, where the Constitution is being daily applied after an interpretation by the agency applying the Constitution and if such interpretation is accepted by the interest affected, the Constitution is given the expression by the agency without the intervention of the judiciary. Such area is much vaster than the area of disputed problems under the Constitution which come to the judiciary for final determination. It is necessary to emphasise that the Constitution is not necessarily and pervasively government by litigation and by the judiciary. Secondly there are many areas under the Indian Constitution which excludes the judiciary and the Courts from interfering or intervening. There the expression is given to the Constitution by the agency or the instrumentality charged with administering the excluded areas. Thirdly judiciary's final expression to the Constitution is always subject to the amendment of the Constitution on the point to overcome such judicial decisions. The history of the amendments of the Indian Constitution in the last seventeen years bears eloquent testimony to that fact.

These three limitations are therefore to be read into the constitutional doctrine of the judiciary giving expression to the Constitution.

VI

RELATIONSHIP WITH THE LEGISLATURE

The correct relationship between the legislature and the executive has been a very vexed problem in constitutional jurisprudence.

The first principle to be observed is that the judiciary does not legislate and the legislature does not judge. The simplicity of this proposition conceals many unsuspected complexities. The Judges do legislate and that in an unobtrusive way. By interpreting Statutes and the Constitution and giving extended or restricted meaning to them, they perform the function of legislation, no doubt indirectly, Mr. Justice Holmes described this process as Judges legislating "interestitially". Similarly the legislature is a Court unto itself about its own rules and conduct within its own precincts, and regarding its own members. In that respect the legislators act as Judges.

The respective jurisdictions of the legislatures and the judiciary, being very close to one another, often lead to one overstepping the limits of the other. The competition for power between the judiciary and the legislatures recently reached a high water mark in the historic dispute represented by the Presidential Reference between the Uttar Pradesh Legislature and the Uttar Pradesh High Court, reported in A.I.R. (1965) SC 745. Parliament and legislatures do not always gracefully accept the judiciary nullifying their Statutes and Acts or giving a meaning to them contrary to their expectations. Judges are embarrassed when Statutes and Constitution are amended to overcome the effects of judicial decisions. The friction, therefore, between the legislature and the judiciary is frequent. One aspect of this friction is represented

by the growing tendency in Acts and Statutes to exclude and restrict access to the Courts by the aggrieved parties.

Harmony between the legislature and the judiciary is fundamental for constitutional peace and good government. It is not enough in constitutional law to separate the two in water tight compartments and to put up barriers and pillars to neatly describe their respective boundaries. They are no doubt necessary. But what is more necessary is an active and dynamic co-operation between the two. The new constitutional jurisprudence that the world awaits is not the 17th, 18th and the 19th century doctrine of separation as co-ordination and co-operation between the two. The desirable principle is based on the recognition of the doctrine that the legislation or law making is one whole process, that law is not to be found as a finished unalterable product manufactured on the anvil of Parliaments and legislatures, ready to be marketed to the nation, for consumption. It is rather the basic raw material or the wholesale product, to be fashioned for individual needs and retail use. The first part of this process is done by the legislatures and the second part by the judiciary. Conceptually there is no conflict and the variation is in the application. It is this total view of law and legislation which alone can bridge the gulf between the legislature and the judiciary. With the one there are passion, prejudice and parley, and with the other, reason, reflection and restraint.

VII

RELATIONSHIP WITH THE EXECUTIVE

The judiciary is functionally different from the executive. This functional difference distinguishes it from the relationship between the judiciary and the legislature. The judiciary and the legislature are functionally and ideologically akin though methodologically and operationally different.

The relationship arises when executive action and conduct or executive orders are challenged as violation of law or the Constitution, or vindictive, malafide, excessive or perverse. Necessarily it creates a climate of conflict. Because the executive is the manifest expression of Governmental power, it is here in this area the judiciary faces the direct challenge of Governmental power. In this challenge, the executive gets the advantage of being directly under the patronage of the legislature, whose party in power represents the focal point of the executive in the cabinet of ministers. The executive is dependent on and in that sense a part of the legislature but the judiciary is independent and outside both. The relationship therefore between the executive and the judiciary is complex, delicate and acute. It is rendered more difficult by the fact that the executive has to act quickly, decide quickly, cannot afford to be placid and patient, consequently has to adopt rough and ready methods. The very opposite is the method of the judiciary, reflective, deliberative, patient and slow moving. The judicial outlook and the judicial method have little in common with the executive outlook and executive methods. The nature of this radical difference has to be grasped clearly to discover a working hypothesis between the two, which will neither paralyse the executive nor introduce tyranny and affront to freedom, liberty and law.

The relationship in the modern age is heavily charged with explosive potentiality. Ever since the last two World Wars and the phenomenal advance of science and technology and methods of mass control, the executive power has been growing rapidly to large dimensions. Although this growth was encouraged by the direct patronage of the legislature, the executive power has now become even a challenge to legislature, which finds it difficult, if not impossible to control the executive and its myriad manifestations.

With the growing complexity and volume of legislation, government and administration, Parliament has not the time, the equipment and the technical skill to cope with the work. This has led to the phenomenon of skeleton legislation. Such skeleton legislation is responsible for the growing power of the executive. It means that the Statute is passed in broadest terms, leaving it to the executive to fill in the necessary and important details. Extensive rule making power for implementation of such legislation is also granted to the executive. In fact it is the executive today which is now doing the most crucial and practical part of legislation. Parliament and legislatures are only producing the skeletons, but it is the executive which is putting all the flesh and blood to make them living. Much of this executive power is without effective control. Constitutional jurists and legal theorists have laid down ineffective maxims about Delegated Legislation and Subordinate Legislation theorising on the doctrine that the Statute must lay down the policies and the guides, which have remained more as paper theories whose practical application has produced little beneficial results. Equally ineffective has been the whole procedure of laying before the House of legislature, which does only lip service to the theory of Parliamentary control, and the whole doctrine of placing on the table has been criticised as a meaningless constitutional ritual.

The entire Administrative Law is really the creation of the executive. It has acquired so great an importance today that it has secured a safe place in modern jurisprudence.

The present problem of relationship between the judiciary and the executive now depends on the judicial control and judicial review of this increasing volume of executive legislation and administrative law. This growing relationship has produced a new phenomenon, the administrative tribunals, which are a half measure between the regular courts with their orthodox judicial procedure and executive mechanics of carrying out and implementing statutes and legislations. They represent a combination of judicial anachronism and modern executive ebullience. The constitution writs are used to operate the judicial control and judicial review of executive actions and orders. But their inadequacy is represented by the defect that in most cases they are prevented from entering into the merits of the executive performance. This has led to the demand in certain quarters for a kind of administrative law and administrative courts on the lines and patterns operating in France as "*Droit Administratif*". Numerous tribunals have already sprung up on the Indian legal scene, such as the labour and the industrial tribunals, the income tax and company tribunals. A part of the judicial problem in this respect is now concerned with standardising the procedure before the administrative tribunals. The present variety of administrative procedures has been criticised as the despair of the aggrieved parties as well as the courts and the tribunals.

There is noticeable a tendency to give a blanket protection to executive action. It is not uncommon to find in modern Statutes and Acts making provisions to say certain executive actions and orders are "final" and beyond the pale of judicial scrutiny. This is done usually in the name of "Emergency" or "Expediency". One feature on this point is to say that the satisfaction or the opinion of the executive is conclusive on the point.

Here as elsewhere the ideal is the harmony between the judiciary and the executive. The State cannot act without the help of either and the Government needs them both. What is needed is a mutual deference between the two. A judicial awareness of the practical considerations and exigencies of executive actions is a constitutional need. A hair splitting juristic imposition upon the executive will stifle the executive action. That judicial deference to the executive has to be evolved and means no more than appreciation of the condition in which the executive has to act. This however cannot mean that the executive can disregard the basic mandates of the policy and purpose of the statutes and legislations or the imperative commands of the Constitution of India. That deference is due from the executive to the judiciary. The efficacy of this doctrine will depend on the mutual wisdom, respect and appreciation between the two with conscious self restraint on either side. That alone can keep the ship of the State on an even keel.

VIII

THE ROLE OF THE INDIAN JUDICIARY IN THE LIGHT OF THE ABOVE

The Judicial Power has not been expressly vested in the judiciary under the Indian Constitution. That is in sharp contrast with the American Constitution. This creates a handicap for the Indian judiciary. Its constitutional consequence is that the judicial power is exercised not only by the judiciary but by other agencies and instrumentalities which have neither the judicial equipment nor the judicial training, nor the judicial climate to observe and follow the norms and principles of adjudication.

There is also no complete separation of the judiciary from the executive under the Indian Constitution. Therefore, there is the clearest Directive Principles of State Policy in Article 50 of the Constitution directing "the State shall take steps to separate the judiciary from the executive in the public services of the State". Some States in India, but not all, have done this in varying degrees. See in this connection the decision in *Nripendra Nath Bagchi vs. Chief Secretary of the Government of West Bengal*, reported in A.I.R. 1961 Calcutta 1, and affirmed on appeal by the Supreme Court reported in A.I.R. 1966, SC 447.

The general tendency of the Indian judiciary has been to uphold its own jurisdiction and powers and to extend them on the principle of "*Boni Est Judicis Ampliare Jurisdictionem*".

It has acted as the guardian and custodian of the Constitution and as the interpreter and arbiter of the constitutional rights and obligations. In particular, it has protected and defended the Fundamental Rights and the life, liberty and property of the citizens.

The Indian judiciary has held the scales of Justice evenly in most instances between the rights of man, the State and the Government.

As interpreter of Statutes and Acts, specially in the field of labour and social welfare legislation, it has taken a liberal and progressive view.

In its battle against the encroachment on the Constitution and the law it has reached high land marks. The 9th Schedule of the Constitution of India shows the long list of Statutes and Acts which the Supreme Court and the High Courts declared ultra vires the Constitution and struck them down as illegal and void. The incorporation of void and illegal Acts into the Constitution to make them constitutional is a striking proof of the failure of the Indian Legislation to conform to the Constitution under which it works. The recent controversy over the 9th Schedule of the Indian Constitution culminating in the decision of the Supreme Court in *Sajjan Singh Vs. The State of Rajasthan*, reported in A.I.R. 1965 SC 845 underlines the nature of the problem on this point.

The other land mark is the recent conflict between the judiciary and the legislature over their respective powers and jurisdictions in the dispute between the Uttar Pradesh Legislature and Uttar Pradesh High Court which became the subject of the Supreme Court's advice on the Presidential Reference reported in A.I.R. 1965 SC 745.

On the eve of the Constitution, the judiciary came into conflict with the executive over the problem of acquisition and control of property resulting in the amendment of Article 31 of the Constitution and its connected provisions, when Prime Minister Mr. Nehru attempted to warn the Judges in his speech in the Constituent Assembly on September 10, 1949 in the following terms :—

“We honour our Judges and respect their independence, but I warn them, we will tolerate no legal quibbles on their part, they must not stand in our way. No law, no Judge is going to come in our way in the abolition of the Zamindari system.” The judiciary did not revise its opinion, but the Government amended the Constitution to overcome the judicial verdict.

I conclude with the following quotation from the “Aspects of Justice” by Sir Carleton Kemp Allen, Q.C. at pages 104-105 in the hope and belief that they apply equally to the Indian Judiciary :—

“This frequent judicial necessity causes impatience, not to say exasperation, to the apostles of pure expediency (which is often impure expediency). It has been evident in recent years in certain branches of English administrative law. Judges who from time to time administer a check to “policy” are reproached by the worshippers of policy with being incorrigibly narrow, conservative, and enslaved to the sanctity of private property. In the vast mass of English case law I do not believe that there is any adequate evidence that our judges have been antagonistic or disloyal to enlightened social policy, either in the development of the Common Law or in the enforcement of statutory schemes. But if sometimes they assert the principles of justice per se as against the plausible solicitations of immediate expediency, they are vindicating

something which is of higher ultimate value than any ephemeral policy; and I believe that the vast majority of British public opinion supports them in so doing.”

Amid the clamour of multiplying and contending interests, the quiet voice of the philosopher, reminding us of such elementary principles as justice and liberty, may teach us more wisdom and resolve more of our doubts than the statistician, the fact-finder and the whole teeming multitude of ologists. Justice is, heaven knows, imperfect enough in its application, but at least ‘it is an ever-fixed mark. That looks on tempests, and is never shaken’. It is the abstract mediations of the thinkers even more than the trials and errors of the doers, which help to keep that mark steady and to send its guiding beams across troubled waters; and for that reason it is from “unpractical” jurists like Stammler that illumination is still to be gained among the evergrowing complexities of social relationships.

Suggested Readings :

1. Benjamin Cardozo—The Nature of Judicial Process.
 2. Benjamin Cardozo—The Growth of Law.
 3. Benjamin Cardozo—Selected Writings’ edited by Margarete Hall.
 4. Lord Denning—Road to Justice.
 5. Lord Denning—Freedom, under the Law.
 6. Justice Frankfurter—Of Law and Men.
 7. Judge Learned Hand—The Spirit of Liberty.
 8. Judge Learned hand—Collected Papers.
 9. Jeremy Bentham & the Law—A Symposium edited by George W. Keeton and George Schwarzenberger.
 10. Mr. Justice Robert Jackson—The Struggle for Judicial Supremacy.
 11. Justice—Josef Pieper (Faber & Faber).
 12. The Public Paper of Chief Justice Earl Warren—edited by Henry M Christman.
 13. Sir C. K. Allen—Aspects of Justice.
 14. Holmes Laski Letters published by Harvard University Press.
 15. Harold J. Borman—Justice in Russia (Harvard University Press).
 16. Vyshinsky—Soviet Constitutional Law.
 17. Law in Action—Lord Asquith.
 18. Sir C. K. Allen—Law and Orders.
 19. Sir C. K. Allen—Law and Disorders.
 20. Executive Discretion and Judicial Control (Hamlyn Lectures)—Prof. C.J. Samson.
 21. Law and the Modern Mind—Jerome Frank.
 22. Author’s Articles on Delegated Legislation & Administrative Law published by the Indian Law Institute, New Delhi.
-

“LAW AS THE FOUNDATION OF CIVILIZATION”

Dr. Purnendu Kumar Banerjee

LLD. DCL. D.Litt. LDH. DI. D.Sc.

Ambassador of India to Costa-Rica and Minister of India in U.S.A.

Down through the ages, history has been the favourite plaything of thinkers and philosophers, politicians and statesmen, moral reformers and poets, as well as plain intellectual dilettantes like me. There have been more theories about history than about any other subject that I can think of. The theories include the simplest and perhaps the most commonly held view of history; the documentation of the achievements and follies of mankind. Goethe affirmed that “History is only a complex of nonsense.” On the other hand, the determinist version of the History of Hegel and Marx interprets it as a movement in which dialectical idealism and dialectical materialism respectively advance it with almost scientific precision from one stage to another. To these theories about history, I have added my own. My theory of History is motivated and fashioned by my partiality for the science of Law, which for me is the basis of order and civilization and thus the gateway to cultural. For me Law is also the crystallisation of a community’s fundamental ideas of proper conduct, of political rights and responsibilities, of social organisation, and therefore a good index for judging the quality and the character of a community’s civilization and culture. As I view history and all the civilizations that have come and gone, I am struck by the fact that every great civilization has been inextricably governed by a legal code. The better and more progressive the legal code, and the degree of respect the people have, then the greater the civilization. And from each great civilization has been distilled the fund of legal knowledge and practice that is our heritage to-day. For me human history and human progress—and very fortunately I see a steady progress in human history—carry the slow but sure signs of evolution “from barbarism to civilization.” In this process Law has played a pre-eminent role.

What is Law? And why and how does it come to have such a close and vital relationship with human evolution and progress? The great Cicero answered this question appropriately in the first century before Christ when he said : “Law was the right reason in accord with nature” adding that “Nature has inclined us to love men and this is the foundation of Law”. In other words, what he was saying was that man is by nature not only a rational but also a *gre-garious* animal. St. Thomas Aquinas later reiterated this by declaring man to be a “Social animal who is irresistibly drawn towards living in a group. Life in a group, however, is not

possible unless each of its members adapt themselves to each other and curb their predatory instincts. Each group, not very long after it comes into being, develops a code of conduct which by general acceptance becomes binding and constitutes its "Law". This is a result of the experience of its members as to what is and what is not conducive to harmonious living within the group. To many of us, so used to associating law with legislation, it is simply the legislature that makes law and the executive that enforces it. But, however, when one analyses Law in its wider sense it embraces custom as well.

The genesis of Law is in the rational and social nature of man. Its growth and evolution is fashioned by the experience and genius of the group upon which it is binding. Will Durant, in his monumental work "The Story of Civilisation" perceives four main stages in the evolution of Law. In the first stage human relations within the group are based primarily on the principle of retaliation or personal revenge, which Cicero described as the "Lex Talionis". It was the "eye for an eye" doctrine. As the heavy and sordid cost of this practice became clear in time, the idea of restitution or "damages" grew up. This led to the second stage when scores were settled by payment in goods rather than in blood. As the practice of "damages" became established, the need was felt for a system whereby the amount of damages acceptable to both sides could be fixed. This was the genesis of the judicial system, and was the third stage in the evolution of Law. The fourth stage was reached when the governing body realised that over and above settling disputes and punishing offences, some effort had to be made to prevent them. At this stage the governing authority, besides being the judge, also becomes a law maker and positive law was added to the general body of "common law" derived from the customs of the group. Besides these four stages. Will Durant also perceived two other characteristics in the evolution of Law. As law develops it tends progressively to become more human, and secondly it provides wider and more numerous liberties and rights.

Let us now examine the role of law and the manner of its development in history. The most obvious thing that strikes us is the fact that every great civilisation has had a legal code which it held in great respect and reverence, as its fundamental attribute. In the ancient civilisation of Babylon it was the code of Hammurabi; for ancient Persia, it was "The book of the Law" of Zoroaster; the Holy Land lived by the "Mosaic Code"; India had the code of Manu; China the code of Chou; Sparta the code of Lycurgus; Athens the code of Solon; and Rome of course its famous Twelve Tables. During the middle ages the Canon Law of the Catholic Church ruled supreme all over the Christian world. Even in the modern day, we find great nations being built or transformed on a foundation of law. The French Revolution ushered in the new age in France and Napoleon set about consolidating it by framing a great new legal code which even today bears his name. The modernisation of Japan, Turkey, and the Soviet Union were made possible by a drastic revision of their respective legal systems. One of the first acts of the new born American nation was the drafting of a constitution. I have no doubt that America's greatness is in no small measure due to the excellence of its constitution which has not only been a source of great inspiration to all its people but has also served as a stabilising factor keeping the enormous federation together. In India too, one

of the first acts of the nation after independence was to set about drafting a constitution. This democratic constitution came into effect on January 26, 1950, under which India held her fourth general election—the largest the world has ever seen, based on adult franchise, involving 250 million voters.

Our examination of history also reveals the slow upward evolution of law on the basis of the contributions, some small some large, made by the various earlier civilisations. Primitive law, as I pointed out earlier was harsh and arbitrary. Not only were the punishments inflicted in humane and out of all proportion to the crime committed but the ruler of chief had unlimited powers of life and death over his subjects, and as did a householder over members of his family. Besides, primitive laws tended to be unequal—being biased in favour of men as against women, children, and slaves in the tribe. These laws were also openly oppressive tending towards controlling every aspect of a man's life and activity. However, with the passage of time the harsher aspects, of primitive law gave way to more progressive concepts. One of the earliest influences was that of Lord Buddha. Buddha in the 6th century B.C. introduced the concept of compassion towards all living beings and deeply influenced contemporary thought in India and the neighbouring countries of Asia. Thus, the laws of Emperor Ashoka in 273-232 B.C. were indeed unique in that age for their humaneness. In western thought, the Stoics were perhaps the first to plead for the removal of excessive harshness in law. We notice some evidence of this under Roman law. We also find original contributions in terms of two important principles of civilised law first that a man should be held innocent until proved guilty and second, the benefit of doubt should favour the accused.

In the matter of arbitrariness of law, the Mosaic Law and the Code of Manu were perhaps the first to strike out against it. Both these systems taught that rulers and ruled alike were the creatures of God and bound equally by his laws, and that the relationship between the ruler and his subjects was similar to that of the householder towards the members of his family. The removal of arbitrariness was carried forward under the Greeks and the Romans, who adopted the practice of written law—a fundamental safeguard against arbitrariness and permanent judicial tribunals to interpret and apply them. To the Greeks we owe the concept of liberty but there was little real progress towards achieving this principle until the Reformation and the Renaissance. Only after the advent of these two historic movements did it become apparent that unless man has a modicum of liberty he could not develop to his full potential. By the time of the French and the American revolutions this concept had taken on the character of a self-evident truth. The concept of equality also came to be accepted slowly. Despite the philosophic enlightenment of the Greeks, they could not conceive of a woman as legally equal to man. And as for a slave, he was by definition an item of property. Christianity no doubt preached the fatherhood of God and the equality in his eyes of all his children, but in actual fact the clergy enjoyed a preeminent position vis-a-vis the people at large. In India and China the Brahmans and Mandarins respectively enjoyed privileged status. It was the reformation, with its then revolutionary concept of the "priesthood of all the faithful" that really made a significant contribution to this concept. Another idea which grew rapidly at the time of the

American and French revolutions was the thought that all men are equal in the service of God then why not in the affairs of state?

A beginning had been made in the field of International Law, before the Christian era, by the non-European countries like India, Egypt and China. The ancient Indians, as pointed out in 1920 by my father in his book "International Law and Customs in Ancient India". had a definite knowledge of the rules of International Law according to which they regulated their interstatal relation and international conduct both in war and in peace. Among the historical documents available. Kautilya's "ARTHA-SHASTRA" is the most important and well-known evidence in this regard.

In Egypt, the discovery and the interpretation of Tel-el-Amarna and Boghazkoy inscriptions are the positive evidence of Egypt's knowledge and practice in International Law. In China, equally conclusive evidences are available, in particular, in interstatal relationships and protection of diplomatic agencies. Thus the Orient made substantial contributions to the development of International Law which never was the monopoly of the Western civilisation alone.

In ancient Europe the Greeks and the Romans made, through their distinctive civilisation, valuable and lasting contribution in the development of International Law. In the middle ages when Europe was ruled by Canon Law, the feeling grew that it was possible for all nations to live under one law. However, with the coming of the reformation and the subsequent birth of the nation state this hopeful trend was sharply arrested.

Hugo Grotious in the 17th century had to make an impassioned appeal for International Law as the basis for a sane world order, and he came to be known therefore as the father of International Law in the west. Opposing the Machiavellian doctrine that States cannot be preserved unless they are absolved from obeying the moral code laid upon their citizens, Grotious declared that States must respect both natural law and Jusgentium defined natural law as "the dictate of right reason showing the moral turpitude, or the moral necessity of any act from its agreement or disagreement with a rational nature." By Jusgentium he meant the accumulation of rules and restraints customarily accepted by the most developed nations in their mutual contacts. He distinguished between just was—(fought in defence against an aggressor) and unjust wars (fought for conquest and plunder). He laid down further that wars must be declared before being waged, that non-combatants must be saved, and that though prisoners may be enslaved they should not be killed. Many of the ideas Grotious propounded is common practice to-day. The U. N. symbolises his dream of International peace and order. The International Court at the Hague is a very distinct and important step forward in the field of International Law marking the beginning of the voluntary surrender of national sovereignty to an international judicial tribunal. The jurisdiction of the Court is completely voluntary. The fact that sovereign States may not be too many, have been bringing their disputes to it and abiding by its decision, is indeed very significant and very hopeful.

History reveals much progress in the field of domestic and international law, but there

is a long way to go. In some countries of the world liberty and equality are still a distant dream, and laws are harsh and arbitrary. South Africa and Southern Rhodesia are two of the most glaring examples of inequality, lack of freedom, and injustice. In numerous other countries, in varying measure, discrimination is practised on grounds of colour, race, religion, and fundamental freedoms are denied. In the international field, the concept of national still sovereignty is a great stumbling block. Big power ambitions, rivalries, political manipulations and militant forces are all elements which endanger world peace. Selfishness is more apparent than cooperation in international relations. We, as responsible and modern citizens of the world, have to strive our utmost to eliminate these vestiges of darkness and these obstacles to progress. Denials of fundamental rights and discrimination in all its forms, wherever they exist, are a blot on our civilisation. We have to strive, by all means at our disposal, to stamp them out. In the international field we must eradicate wars and usher in international justice and cooperation. Harold Stassen once said, "A single squadron of modern bombers in one flight can pack a destructive power greater than all the bombs carried by all the airplanes in all of their flights on both sides in World War II." That was said some time ago. To-day this could very likely be said of one single plane rather than of a whole squadron. Nuclear war in the modern day amounts to suicide. Man, for the sake of his self-preservation, submits himself to the laws that make society possible. So also has it become absolutely necessary for the nations of the world to subject themselves to a code of conduct which makes life in the international community workable. A certain curtailment of national sovereignty is inescapable, since the choice is between a curtailment of sovereignty or world chaos and destruction, the former is a small price to pay for the latter. The concept of community has grown from a narrow tribal basis to that of the nation state. It has become necessary that we endure to live peacefully in larger and larger units. There is no stopping short of a world community. We have to replace anarchy by order, arrogance by understanding and aggression by cooperation in the international community.

The basic minimum in an international code of conduct for a sane world order is enshrined in the U. N. Charter. This was further strengthened by the principles of Panch Shila adopted by the newly independent countries who met in 1954. In essence, the five principles of Panch Shila laid down that States can and must co-exist peacefully, and co-operate with each other for individual, mutual and general benefit.

As war is the climax of international intolerance and opportunism, so is peace the outcome of proper understanding and cooperation among nations. We must achieve international accord by cooperating in solving problems of economic, social, cultural, and humanitarian character by promoting and encouraging respect for the human rights of all, without regard for race, sex, language or religion.

The discovery of atomic energy has radically changed the international milieu. The nuclear age, coupled with revolution in mass media, has brought the territorially divided world technologically together. The interdependence of the world is inescapable. This technological imperative of international cooperation is both a challenge and an opportunity. Whereas the

inhabitants of some areas of the world today live in the most magnificent luxury, others live in unimaginable poverty and distress. Mankind today has the technological knowledge and the means to make poverty, hunger and disease a thing of the past; to provide to all its members a full and dignified life; and to make this the most glorious age in all of history. It is a tragic irony that today the world is spending over 600 million dollars a day on arms and defence, when for just about 10 million dollars a day, the whole of the underdeveloped world could be raised to a full and dignified life within a decade. There cannot be a truly world half rich and half poor. Existence of a slum in a prosperous community, if not taken care of and remedied in time, is bound to spread and infect the very prosperity of the community and turn it into an extended slum. Similarly the world cannot subsist in peace for long, if one part remains enslaved in poverty while the other enjoys prosperity in isolation.

Of course, the prime responsibility for improvement through hard work and self-help, lies with the developing countries themselves. There is concrete evidence that this determination exists. For instance, India in the past two decades has almost doubled the agricultural production; created 30 million jobs; put 45 million children in schools; added 20 years to the life of an average Indian; more than trebled installed electrical power capacity; increased industrial output by at least 150 per cent; and broken into the nuclear age by installing three atomic reactors and undertaking the building of three atomic power stations. In twenty years, India has risen from one of the most economically backward countries to the seventh most industrialised nation in the world. She is one of the top eight in the field of atomic energy. Eighty per cent of all the expenditure incurred on this enormous development programme and almost the entire manpower has been contributed by India itself. India's food production has risen from 55m. tons in 1947 to 100 m. tons in 1968. However, the capital equipment and the foreign exchange to buy the equipment came from abroad and this is where assistance from the industrially advanced nations played a very important role.

Scientific development and technology has broken down the barriers and limitations of past ages and opened the doors for Man's life in world community. How man adjusts himself to the new situation will determine the crucial issues of war and peace and even that of his very survival. If he fails to respond to the challenges posed by this age, he might bring about total destruction of himself and the edifice he has built. Being an optimist myself, and having a great faith in human ability to rise to the occasion, I feel confident that mankind will accept the challenge and succeed in making the dream a reality. There will no doubt be difficulties. We will slip and fall, but we will rise and carry on as we have done before till we reach the stage where peoples of the world will love and respect one another; where instead of confrontation there will be co-operation; where the strong and rich will help the poor and the weak; and where, enlightened universalism will replace narrow nationalism and the only pre-eminent authority will be International Law:

*[The article is based on the Convocation address of the author before the University of San Fernando Valley, California.]

THE PRINCIPLES OF NATURAL JUSTICE

Sunil Kumar Mitra

M.A., LL.B., Lecturer, University College of Law (on leave)

The principle of natural justice possibly owes its origin to the concept of natural law. According to Freedman, 'natural law is an ideal to which the positive law ought to conform.' Natural law is inspired by two ideas, namely, of an universal order governing all and of inalienable right of individuals. Natural law which is the mother of natural justice may be described in modest language, as general principles of law.

Natural justice may be briefly defined as certain fundamental rules of judicial procedure. Based upon the doctrine of the Rule of Law the principles of Natural Justice are briefly expressed in the following two Latin maxims :—

1. **Nemo debet esse judex in propria causa**—"No one should be a Judge in his own cause", i.e. the Tribunal must be impartial.
2. **Audi Alteram Partem**—No man should be condemned unheard, i.e. both sides in case should be heard by the Judge.

Besides the above two maxims, judicial pronouncements have established another principle namely, that the trial should be held in good faith without bias and not arbitrarily or unreasonably.

As observed by the Supreme Court in 'A.K. Kraipak Vs. Union of India' AIR 1970, S.C. 150 "The concept of natural justice has undergone a great deal of change in recent years. In the past it was thought that it included just two rules, namely, (1) no one shall be a judge in his own case (*Nemo debet esse judex propria causa*) and (2) no decision shall be given against a party without affording him a reasonable hearing (*Audi Alteram partem*). Very soon thereafter a third rule was envisaged and, that is, that quasjudicial enquiries must be held in good fair without bias and not arbitrarily or unreasonably"

In the American Constitution, the principle of natural justice finds recognition in the 'due process Clause' which is to be found in the 5th and 14th Amendments of the American Constitution. The 5th Amendment of the American Constitution provides that no person shall be "deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation". The 14th Amendment of the American Constitution also provides that "nor shall any State deprive any person of life, liberty or property

without due process of law, nor deny to any person within its jurisdiction the equal protection of law.

Due process according to Prof. Willis includes both the substantive as well as the procedural aspect. In its substantive aspect, due process connotes the substantive reasonableness of the laws and in its procedural aspect, due process consists of the following four factors :—

- a) Fair and reasonable notice.
- b) Opportunity of representation.
- c) Orderly course of procedure, and
- d) Impartial tribunal.

The principle of natural justice has been held to apply :—

1. To all judicial bodies and Courts of general or special jurisdiction, and
2. To all tribunals, statutory or otherwise, acting in a judicial or quasijudicial capacity.

The principle of natural justice does not apply either to purely legislative act or to purely administrative or ministerial acts. 'It would be erroneous to import into the consideration of an administrative order the principle of natural justice.'

The difference between purely administrative acts and judicial acts is briefly stated as follows :—

"Administrative acts, orders or decisions are not dependent upon the evidence adduced, but if any authority which has to decide the right of the party, comes, to the decision only after taking evidence or hearing parties, it is said to act judicially" (P. B. Mukherjee J. in 'Nripendra Nath Banerjee Vs. Chief Secretary, West Bengal'—AIR 1961 Cal. I).

The following principles of judicial review have been laid down in respect of a domestic tribunal

- a) Rules under which tribunals work must be strictly complied with.
- b) The test of natural justice, unless it is excluded by the rules, must be strictly followed.

If these two rules are fulfilled, the Courts cannot sit in appeal over any order of a domestic tribunal.

As stated earlier, the two underlying canons of natural justice are :—

1. **Nemo debet esse judex in propria causa.** (No one should be a Judge in his own case).
2. **Audi Alteram Partem.** (No man should be condemned unheard).

Impartial Tribunal :

1. **Nemo debet esse judex in propria causa.**

A Judge must decide a case impartially. Bias by interest which disqualifies a Judge falls into two broad cases :—

- a) Where the Judge has a pecuniary interest in the subject matter of litigation.
- b) Where from kindred or other cause, the Judge may have a bias in favour of one of the parties.

The two essential characteristics of an impartial tribunal are the following :—

- A. A Judge should have no interest legal, personal or financial in the subject matter. Bias is presumed if the Judge has such an interest.

In the words of Lord Hewart—“Justice should not only be done but should manifestly and undoubtedly be seen to be done.”

- B. A Judge must be free from bias i.e. he must adjudicate with an open and independent mind, without any inclination in favour of one side in the disputes.

The test is whether there is in the mind of the litigant a reasonable apprehension that he would not get a fair trial.

The following examples of bias may be mentioned :—

- a) Relationship of the Judge.
- b) Personal friendship.
- c) Professional or Employment Relationship.
- d) Pecuniary or any other interest in the subject matter of the litigation.
- e) The Judge acted as witness against any party.

“The law does not measure the amount of interest which a Judge possesses. If he has any legal interest in the decision of the question one way he is disqualified, no matter how small the interest may be” (Sergeant Vs. Date (1877) 12 QB. 558).

In explaining the reason behind the rule, it is also stated therein as follows—“the law in laying down this strict rule has regard not so much perhaps to the motives which might be supposed to bias the Judge as to the susceptibilities of the litigant parties.”

The Constitution of India has also made the following provisions :—

- a) In case of preventive detention, the Advisory Board which will report as to the justification of detention beyond three months is to consist of persons fit to be appointed as High Court Judges. [Art. 22(4)(a)].
- b) In case of members of the Civil Services of the Union or of a State any order for dismissal or removal can be made only by persons who are not subordinate to the appointing authority.

It may also be mentioned in this connection that Section 556 of the Criminal Procedure Code 1898 provides as follows : “No Judge or Magistrate shall, except with the permission of the Court to which an appeal lies from his Court, try or commit for trial any case to or in which he is a party, or personally interested, and no Judge or Magistrate shall hear an appeal from any judgment or order passed or made by himself.”

2. Audi Alteram Partem.

This maxim embraces the following principles :—

- A. Reasonable notice.
- B. Reasonable opportunity of representation.
- C. Orderly course of procedure.

Briefly put a man must know the case he has to meet and he must have a reasonable opportunity of meeting the case.

The principle of Audi Alteram Partem, that is, “No person should be condemned unheard” is derived from the following principles :—

- a) Due process Clause of the U.S.A.
- b) Rule of Law of the U.K.

This is an elastic concept and depends upon the facts of each case.

A. Reasonable Notice

The minimum requirements of notice are the following :—

- a) The notice must be addressed to the party.
- b) It must state the place of hearing and the time of hearing when the Judge proposes to proceed with the matter.
- c) The charge or the show-cause notice must not be vague and must afford sufficient opportunity to the party affected. It must contain sufficient particulars.

A party must get reasonable notice of the case he has to meet, so that he may get reasonable opportunity to state his case. The following four factors should be borne in mind in deciding this principle :—

- a) The onus to establish lack of notice is on the petitioner.
- b) Adequacy of notice depends on the facts of each case.
- c) If a notice of one charge is given, the party cannot be punished for a separate charge.
- d) The principle does not apply in case of purely administrative act.

B. Reasonable opportunity for representation :

In the case of *Hagar Vs. Reclamation District*, (1884) 111 U.S. 701 due process was interpreted as follows :

“Whenever it is necessary for the protection of the parties it must give them an opportunity to be heard respecting the justness of the judgment sought.”

As laid down in the case of *State of Punjab Vs. Karam Chand Jain* (A.I.R. 1959—Punjab 462) the following are the basis requirements of reasonable opportunity.

- a) Every person must be given personal notice of charges he has to answer.
- b) He must be informed of the place where and the time when he shall so answer.

- c) He is given an opportunity if he so chooses to cross-examine witnesses produced against him.
- d) He is given opportunity to produce evidence and witnesses to refute the charges, after all evidences against him are produced and known to him.
- e) The decision of the Court or Tribunal must be governed by and based upon evidence at the hearing.
- f) He is afforded an opportunity to make representation as to why the proposed punishments should not be inflicted.
- g) The hearing had to be before an unbiased and unprejudiced officer. (*Khem Chand Vs. Union of India*—A.I.R. 1958—S.C. 300).

The minimum that a Court will insist upon is that there must be “a real and effective opportunity of meeting any relevant allegations made against him.”

Judicial decisions have laid down the following additional principles :—

- 1. If the party does not avail of the opportunity of representation or chooses to be absent from the proceedings in spite of notice, then he cannot complain of failure of natural justice.
- 2. “Even when a statute does not contain any specific provision for notice or hearing, the principles of *Audi Alteram Partem* (No man should be condemned unheard) should be applied to proceedings before a Tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals” (*House of Lords (Lord Reid) in Ridge-vs-Baldwin and Anr.* (1963) 2 A.E.R. 66 at Page 73-75).
- 3. Similarly the Supreme Court of India in *State of Orissa-vs-Dr. (Miss) Binapani Dai* AIR 1967 S.C. 1269 held as follows :

“The person against whom an enquiry is held must be informed of the case he is called upon to meet and the evidence is support thereof. The rule that a party to whose prejudice an order is intended to be passed is entitled to hearing applies alike to judicial Tribunals and bodies of persons invested with authority to adjudicate upon matters involving civil consequences. If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power.”

C. Orderly Course of Procedure :

It is not necessary that the ordinary rule or evidence prevailing in a Court of Law should be applied.

The Supreme Court has laid down the following four rules of evidence (*Union of India Vs. T. R. Varma*, A.I.R. 1957—S.C. 882).

- 1. Every party should have opportunity of adducing all relevant evidence.
- 2. Evidence of the opponent is to be taken in his presence.

3. Every party should be given opportunity of cross-examining witnesses examined by the other party.
4. No material should be relied upon against him without giving him an opportunity of explaining them.

Recording of evidence and opportunity for cross-examinations before a Tribunal need not strictly follow the Evidence Act or the procedure in a Court of Law. The following principles have been judicially recognised :—

- a) There is no universal rule as to the kind of hearing required. 'It is sufficient if a case is heard in a judicial spirit in accordance with the principle of substantial justice.'
- b) The right to make a written representation or to submit an explanation to the charges should be given. Natural justice does not however require that a personal hearing must always be given particularly when such oral hearing is not asked for, unless there is statutory provision therefor, e.g. Section 124 of the Customs Act, 1962, Rule 55 of the Civil Service (Classification, Control and Appeal) Rules, The Public Servants (Inquiries) Act, 1850 etc. When, however, such evidence is given, personal hearing should be given to explain the evidence. To quote the Supreme Court in *Gopaland Vs. Madras* (1950) S.C.R. 88(124) and approved in *T. C. Roy Vs. Collector of Customs* (1957) S.C.A. 764—"I am not prepared to accept the contention that a right to be heard orally is an essential right of procedure even according to the rules of natural justice. The right to defence may be admitted but there is nothing to support the contention that an oral interview is compulsory."
- c) Similarly no natural justice requires that there should be a kind of formal cross-examination. "Formal cross-examination is procedural justice. It is governed by rules of evidence. It is the creation of courts and not a part of natural justice but of legal and statutory justice" (*P. B. Mukharji J. in K. L. Agarwalla Vs. Collector, Land Customs* 69 C.W.A. 864 (817)).
- d) There is no natural right to be represented by a lawyer unless the complication of the case or volume of evidence or important questions of law involved require it.

Natural justice under the Indian Constitution :

The principle of natural justice has also been accepted in the Constitution of India. Although the American doctrine of due process of law and judicial review had not been applied by the Courts in India, yet the Constitution of India enjoins upon the Supreme Court and the High Courts to declare any law passed by the Parliament or State Legislature as unconstitutional, if it takes away or abridges any of the fundamental rights guaranteed in Part III of the Constitution (Art. 13). The Supreme Court or the High Courts may also strike down laws on the ground of arbitrary discrimination (Art. 14), or on the ground of unreasonable restriction (Art. 19) and in case of deprivation of liberty, if the order of detention is in violation of the provisions of Art. 21 or Art. 22 of the Constitution.

In the case of 'Mukhtar Singh Vs. U.P.' (AIR 1057 All 297) the Supreme Court held that the principles of natural justice could be worked in our country generally in the three following cases :—

- a) When it is alleged that a certain person or class of persons have been unreasonably discriminated against, and that the law violates the provisions of Article 14 or that the restrictions imposed upon the freedom guaranteed under Article 19 are unreasonable.
- b) When a rule or regulation or order made in the exercise of a statutory power is attacked on the ground that it is unreasonable.
- c) When the procedure adopted by the judicial or quasi-judicial authority not being one prescribed by law is challenged on the ground that it is unfair and unjust.

The Constitution of India also provides for adequate opportunity of representation. In case of punitive detention under Article 22 (1) of the Constitution, 'the person arrested must be informed, as soon as may be, of the grounds of such arrest' and he will not be denied the right to consult and to be defended by a legal practitioner of his choice.' In case of preventive detention under Article 22(5) of the Constitution, 'the authorities must communicate to him the ground on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

Similarly Art. 311 (2) of the Constitution confers two-fold rights to persons employed in Civil capacities, under the Union or a State namely, (a) in case of dismissal, removal or reduction in rank, 'the civil servant must be informed of the charges against him and be given reasonable opportunity of being heard in respect of those charges and (b) where it is proposed after such enquiry to impose on him any such penalty, until he has been given a reasonable opportunity of making representation on the penalty proposed but only on the basis of the evidence adduced.'

The Supreme Court and the High Courts are also given supervisory jurisdiction over inferior Courts and other quasi-judicial bodies and Tribunals. The Constitution has authorised the Supreme Court and the High Courts to issue writs of Certiorari under Articles 32 and 226 of the Constitution. The High Courts can invoke Article 227 and the Supreme Court may grant 'special leave to appeal' under Article 136, of the Constitution if there is a failure of the principles of natural justice.

The following principles have been judicially recognised :—

c) He

1. There is no inflexible rules of natural justice of universal application. Every case must be determined separately.

As observed by the Supreme Court in 'Bharat Barrel and Drum Manufacturing Co. Vs. L. K. Bose others' AIR 1967 S.C. Page 361.

"It is now well settled that while considering the question of breach of the principles of natural justice, the Court should not proceed as if there are any inflexible rules

of natural justice of universal application. The court therefore, had to consider in each case whether in the light of the facts and circumstances of that case, the nature of the issues involved in the inquiry, the nature of the order passed and the interest affected thereby, a fair and reasonable opportunity of being heard was finished to the person affected."

2. Regarding hearing before any Tribunal other than a Court of Law, 'there is no obligation to adopt the regular forms of judicial procedure.' It is sufficient that the case has been heard in a judicial spirit and in accordance with the principles of substantial justice [Local Government Board Vs. Arlidge (1915) A.C. 120 (HL)].
3. What is fair opportunity well depend upon the facts and circumstances of each case.
4. "When a statute confers a discretion on an executive authority or a Minister to exercise or not to exercise a power and does not expressly limit the extent of his discretion and does not require him to give reason therefor, his discretion must nevertheless be limited to the extent that it must not be used so as so frustrate the object of the statute, which confers the discretion." (House of Lords in 'Podfield and others Vs. Minister of Agriculture, Fisheries and Food and others'—(1968) 1 A.E.R. 694.

"What particular rules of natural justice should apply to a given case must depend to a great extent on (a) the facts and circumstances of that case, (b) the frame work of the law under which the enquiry is held and (c) the construction of the tribunal or body of persons appointed for that purpose."

"Whenever a complaint is made that some principle of natural justice had been contravened, the Court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case." 'Kraipak Vs. Union of India' AIR 1970 S.C. 150 (156).

The tendency of the recent judicial pronouncements in India and abroad is to extend the principle of natural justice from judicial and quasi-judicial bodies to administrative bodies and domestic tribunals.

As observed by the Supreme Court in 'Kraipik Vs. Union of India,' AIR 1970 S.C. 150.

"If the purpose of the rules of natural justice is to prevent miscarriage of justice, one fails to see why those rules should be made inapplicable to administrative enquiries. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries.

Similarly D. Basu J. held in 'Rama Kanta Vs. District Scholl Board.' (AIR 1969 Cal. 397) as follows :—

"The duty to act judicially is implecit in the exercise of the power to dismiss an employee on charge of misconduct even though the statute which confers such power is silent about the procedure to be adopted"

In a recent case ('The Bihar School Examination Board Vs. Subhas Chandra Sinha and others' 1970 (1) Supreme Court Cases 648) the Supreme Court of India however held that if an examination was vitiated by adoption of unfair means on a large scale and if the examination

as a whole is cancelled, it was not necessary for the Board to give an opportunity to each of the candidates and it would be wrong to insist that the Board must hold a detailed inquiry into the matter and examine each individual case to satisfy which of the candidates has not adopted unfair means.

Hidayatullah C.J. observed "while we do not wish to whittle down the requirements of natural justice and fair play in cases where such requirement may be said to arise, we do not want that the court should be understood as having stated that an enquiry with a right to representation must always precede in every case, however different."

I may conclude this article by quoting the famous observation of P. B. Mukharji J. in *K. L. Agarwalla Vs. Collector Land Customs* 69 CWN 864 (877).

"Natural justice is fast becoming the most unnatural and artificial justice and for that confusion the courts are no less responsible than the litigant. The judicial climate on this point is thickly clouded with many decisions. The result is that the danger of confusion has become real and natural justice is on the misleading road of sentimental potentialities."

JUSTICE IN ACTION

Prof. S. A. Masud,
M.A., LL.B. Barrister-at-law

Lawyers and Judges are priests in the temple of Justice whose mission and message is to establish justice in society. If these votaries fail, the stability in society is shaken and new problems with ugly propensities raise their heads. Constant endeavours for solving judicial anomalies ensue, only to be engulfed in the shackles of newer and larger numbers of difficult situations. Moral rehabilitation in every sphere of life is required to be established, if necessary, by stern measures and meticulous implementation. Bloods flow cheaply over the desecration of temples of God, but very few even raise their voice in protest against the shrieks and agonies of injustice perpetrated in temples of justice, our Courts of law. A few devout worshippers among the legal priests, the lawyers and judges, silently work their ways with honesty and steadfastness, but they are not effective enough to avert the crisis. Must the right-thinking men allow the *status quo* to continue or would they tighten their belts and re-vitalize the legal world by producing great lawyers and great judges.

Controversies naturally arise to determine the test, standard, or measure of greatness among lawyers and judges. But if people can shake off the superficialities and pragmatic success, the controversies would cease to be enigma. It is not indispensable that a person has got to have high mental equipment or a strong armoury of vocabulary to earn the reputation of becoming a great lawyer or a great judge. Even a colourful academic career or meteoric success is not a *sine qua non* to acquire such a status. Meritorious records in the University are certainly helpful and have their usefulness, but they corrode or fade out if legal career is not pursued with honesty, integrity and devotion to learning. Similarly busy practice of a lawyer with his masterly strategy to win a case or a quick disposal of cases by a judge by stifling and gagging the genuine grievances of a litigant does not make him famous. It is erroneous to assume that a man is successful in law because he has managed to establish a big practice or because he is appointed a judge. A busy lawyer need not necessarily become a good judge. Nor it is uncommon to find that a lawyer with negligible practice has proved himself to be a respected and popular judge. Thus, success of a lawyer or a judge does not depend upon the quantity or volume of legal disputes disposed of by him. Flashy, spectacular advocacy of a lawyer often does help in building up a practice. It is often useful and effective in witness action, address to the jury or in persuading a vacillating judge. A lawyer with ability to address the court with dramatic skill

may secure large number of cases and earn money yet he may not be remembered as a sound lawyer. Similarly, a judge with profound intellectual development and ability to dispose of cases with amazing quickness may be a disappointment to the Bar.

The whole fallacy lies in wrong approach to life. The attitude of judging a person on the basis of his mundane prosperity is materialistic and foreign to the intellectual and spiritual traditions of India. A man is more important than his office, position or wealth. The quality and not the quantity should be the determining factor. A true philosophy cannot give recognition to material prosperity or superficial success in preference to character, devotion and learning which alone, when imbibed by a person, evoke universal approbation and spontaneous respect from all. To describe a busy lawyer or a quick judge with no character, scruple or principle as a success is as bad as to eulogize a rich black-marketeer or a profitter as a great patriot or a great industrialist. A lawyer or a judge, who is innately good but intellectually weak or below the average, cannot have a good reputation because of his want of creative faculty which results in failure of justice. An advocate or a judge who is otherwise polite, courteous or even conscientious may not be remembered with pride unless by hard labour and without fear or favour he plays his cards well or at least does his duty with average intelligence. It is absolutely wrong for a judge to think that with his appointment as a judge he has become sacrosanct and is above criticism.

A lawyer's first and foremost duty is to his client. But this does not mean that his object is to win his client's case by hook or by crook. His client's case may be very weak, but his duty lies in presenting his client's case clearly, fully and with relevant laws and precedents. Omission to present material facts or laws or adjudications would mislead the court and such neglect of duty would defeat the real object. A lawyer therefore who does not work hard enough to have a complete grasp of the facts of his client's case and to find out relevant laws and decisions from well-known text books, reported decisions and current law journals, cannot do justice to himself, to his client or to the court. This is possible only when a lawyer burns midnight oil over his client's case. It is a common knowledge that a junior lawyer is often of greater assistance to the Bench than a senior lawyer who has not cared to marshal the relevant facts and law. After the preliminary stage of preparation, comes the stage of presentation. The diction, style, pronunciation, fluency, certainly create a great impression but to a sober thoughtful conscientious judge, the presentation of facts and laws even in orthodox or, to use the hateful expression, native style, carry greater weight, if there is substance in the lawyer's argument. To create a mark, it is necessary to add, if possible, original arguments to age-old points of law and such presentation of original arguments can only be result of independent thinking, which unfortunately has become an uncommon virtue. The last stage is fairness to the Bar, bench and client. Lawyers are enjoined to secure justice by assisting the court and not engaged to win their cases by unfair means. It is one thing to contest a case for the client with all the emphasis and gusto, but it is another to identify oneself with the client and abandon all sense of dignity and decorum by loss of temper, abusive remarks, dishonest submissions.

Sharing of fees with solicitors or intermediaries, undue prolongation of case, wrong advice to client by encouraging him to have multiplicity of legal proceedings, false hope to a client with a difficult case, attempt to influence the judge directly or indirectly, reference to over-ruled decisions of courts and reliance on them, are few of the common cases of unfair practice seen in our noble profession. Last but not the least, the unhealthy habit of backbiting lawyers or judges in the judge's chamber or their houses and maligning them spitefully with distorted facts, often in the nature of hearsay, is another phenomenon which vitiates the healthy atmosphere of our temples of justice. Instances are not rare when some unscrupulous lawyers in their anxiety to show loyalty to their clients' case make a practice of engaging particular advocates in particular courts with the hope of getting favourable orders. Even counsel is briefed from one State to another State, because the particular judge who would hear the case is a friend or an old acquaintance of the counsel. Similarly, the practice of some lawyers aligning themselves with one group of seniors or the other canvassing directly or indirectly for being appointed in high judicial offices have become, contrary to all noble ideals, the rule of the day.

A strong and independent judiciary sustains the vitality of Parliamentary democracy. If judges fail, democracy becomes a mockery. Weak and servile judges put the hands of the clock back. Similarly, members of the Bar when they become weak, insipid and selfish, invariably encourage corruption nepotism and injustice. Again, judges, lawyers, often become dumb spectators and helpless actors in the drama of life, if legislature propound unhealthy, thoughtless, reactionary, pieces of legislations. In a welfare state, judges, lawyers and legislators should be inspired with ideals of truth and justice. If they fail, country fails. Human life is only short sojourn in the eternal journey of our soul and if a man is to be remembered with pride and glory he must live through his deeds. In this world of temptation, competition and frustration a person should strive to approximate the accepted ideals of life, because some men, although few in number, in all periods of history, have inspired people to live an intellectual and spiritual life. Shall we emulate their examples or should we sing the song of opportunism? A resurgent India needs all classes of people,—Lawyers and Scientists, Doctors and Engineers, peasants and Workers, the Executive and the Judiciary, to do their respective duties in their own spheres honestly and industriously and then and then alone, Nature's grand division of labour will be integrated to the harmonious well-being of our mother land.

SOME REFLECTIONS ON LEGAL EDUCATION IN CALCUTTA UNIVERSITY

M. L. Upadhyaya

Ph. D (London), Professor of Law, Head of the Law Deptt.,
University College of Law, Calcutta University, Calcutta-700073.

Calcutta University at the turn of the present century was only an examining body. It conducted examinations and awarded degrees. The teaching was carried out in the colleges affiliated to the University. The Governor-General and Viceroy of India was the ex-officio Chancellor of all the Indian Universities. There were five Universities in India at that time namely Calcutta, Bombay, Madras, Allahabad and the Punjab University at Lahore. Of these the jurisdiction of Calcutta University at that time extended to the then provinces of Bengal, Assam and Burma. Bengal in those days included the present states of West Bengal, Bihar, Orissa and also Bangladesh. In his capacity as the Chancellor of the Indian Universities, Lord Curzon called an educational conference at Simla in 1901. As a measure of follow up action of this conference, the Indian Universities Commission was appointed in 1902. The Commission was headed by Sir Thomas Raleigh, then Vice-Chancellor of Calcutta University. One of the significant recommendations of this commission was to promote teaching by the Universities. The Commission in paragraph 24 of its report observed as follows :—

“We think it expedient that undergraduate students should be left, in the main, to the colleges, but we suggest that the Universities may justify their existence as teaching bodies by making further and better provision for advanced courses of study. The University may appoint its own lecturers, and provide libraries and laboratories; it would also be proper that the University should see that residential quarters are provided for students from a distance.”¹

The recommendations of this Committee were accepted by the Government and were incorporated in a Bill which subsequently became the Indian Universities Act, 1904 (Act VIII of 1904). It was a central Act as the Universities then were under the control of the Central Government and not under that of, the provincial government. The Act received the assent of the Governor-General on 24 March, 1904 and came into force from 1 September, 1904. Section 3 of this Act expressly provided that :

“The University shall be and shall be deemed to have been incorporated for the purpose

of making provision for the instruction of students, with power to appoint University Professors and Lecturers, and to erect and maintain University Libraries, Laboratories and Museums.”

This was indeed a major innovation and an improvement of far reaching importance over the original Act of incorporation passed in 1857. However, even after the Act came into operation, the teaching departments in the University could not be started for quite some time. The reconstituted Senate under the new Act had to prepare a body of new regulations to give effect to various provisions of the Act. Alexander Pedlar, who was the Head of the Educational Department of Bengal, and who had a leading hand in the framing of the new Act was appointed Vice-Chancellor of Calcutta University to carry out the new policy. But he failed to secure the support of the Senate and the new regulations could not be passed before the expiry of his term of office.

It was at this critical juncture in the history of Calcutta University that Sir Asutosh Mukherjee assumed the office of Vice-Chancellor on 31 March, 1906. In order to facilitate an early formulation and adoption of the regulations to carry out the purposes of the new Act, the government had to take a rather unpleasant but bold step. In stead of leaving this task to a large body like the Senate to do the job, a small Committee under the Chairmanship of Sir Asutosh was especially constituted for this specific job. The new regulations came into force from 11 August, 1906. Sir Asutosh held the office of Vice-Chancellor for four terms of two years each from 1906 to 1914. It was during his tenure that the University College of Law of Calcutta University came into being. Sir Asutosh prepared a comprehensive minute on reform of legal education in Calcutta University in which he deprecated then prevailing practice of attaching law classes to Arts and Commerce Colleges and pleaded for opening of a separate Law College to be managed by the University itself. The minute was considered by the Syndicate at its meeting dated 4 July, 1908 when the following resolution was adopted :

“The Syndicate recommends to the Senate that a University Law College be established and the Syndicate be authorised to appoint a provisional Committee to organise it.”²

There already existed facilities for teaching law Courses in colleges affiliated to Calcutta University but the conditions were far from satisfactory, Sir Asutosh in his minute pleaded for the need of reform in the existing system and observed as follows :

“The branch of our education system which stands in need of the most urgent and radical reform is that concerned with the teaching of law for our degree examinations. It is a noteworthy fact that we have not got a single college devoted entirely to the study of law as we have in the cases of Medicine and Engineering”.³

The minute was considered by the Faculty of law at a special meeting dated 14 July, 1908 and the Faculty adopted the following resolution:

“That the Faculty do record its opinion that for the promotion of legal education of students for degrees in law, it is desirable to establish a University Law College to serve as a model, but not so as to create a mono-poly either general or local.”⁴

The Senate at its meeting dated 21 July, 1908 unanimously adopted the following resolution:

“That the University Law College be established and that the Syndicate be authorised to appoint a provisional Committee to organise it.....that the college is to be established for the promotion of legal education of students for degrees in law and to serve as a model college and not with a view to create a monopoly either general or local.”⁵

Thus when the University College of Law came into being, the other affiliated colleges conducting law classes were allowed to retain the privilege. The University College of Law started functioning from July, 1909. It started with a staff strength of twelve and the number of students enrolled in the first year was 520. The new regulations under the Act of 1904 instituted three law examinations and insisted on a three years' course of study for the B.L Examination. In addition to regular lectures, there was arrangement for tutorials and moot courts. The number of courses prescribed for study was however twelve spread over a period of three years. The college also provided the facility for higher studies leading to the degrees of LL.M. and LL.D. As the college was fortunate enough in receiving generous grants both from the provincial as well as the Central governments as also from a large number of private individuals, it was able to institute several prizes, awards and scholarships. Soon the college came to possess a good library and a students' hostel exclusively for the law students with a capacity to accommodate 160 students. Out of the funds so generously granted to the Law College, Calcutta University was able to institute some of the well known endowment lectureship—the most prestigious of them being the Tagore Professorship.

Be that as it may, the courses introduced under the regulations of 1906 were patterned after then prevailing scheme of LL.B. of the University of London. There were, of course, periodic revisions. The latest major revision was effected in the year 1969 so as to bring the scheme in conformity with the one recommended by the Bar Council of India. Thus today Calcutta University like other Indian Universities is imparting instructions in 18 courses spread over a period of three years. In the first year i.e., preliminary LL.B. the students study six compulsory papers, another six compulsory papers in the second year i.e., intermediate LL.B. and in the third year i.e. in Final LL.B. they study two compulsory papers with four optional subjects out of a list of ten such subjects. This scheme is, with minor variations, followed by other two Universities of West Bengal which impart instructions in LL.B. and also by Universities in Assam and Orissa. At present there are three Universities in West Bengal which impart instructions in Law : they are Calcutta University, Burdwan University and the University of North Bengal, which the University of North Bengal and Burdwan University do not have affiliated Colleges teaching law, Calcutta University has three affiliated law colleges in addition to the University College of Law. One of the affiliated Law College namely the Surendranath Law College (formerly Ripon College) is even elder than the University College of Law having been founded in 1885.

The courses prescribed for study under the existing syllabus are as under :

Preliminary :

1. Indian Legal and Constitutional History

2. Constitutional Law of India
3. English Constitutional Law
4. Legal Theory
5. Contract
6. Torts

Intermediate :

1. Family Law
2. Property Law
3. Evidence
4. Crimes & Criminal Procedure
5. Civil Procedure, Arbitration and Limitation
6. Law of Landlord and Tenant

Final :

1. Rules of Court
2. Drafting of Pleadings and Documents

Optional Papers :

1. Administrative Law
2. Equity, Trust and Specific Relief
3. Public International Law
4. Company Law
5. Labour Law
6. Taxation
7. Insurance
8. Interpretation of Statutes and Principles of Legislation
9. Legal Remedies
10. Private International Law

These courses have been in force for the last seven years. The Board of Studies in law of Calcutta University recently met and the issue regarding possible restructuring of these courses was also considered. It was decided that the existing scheme should be reviewed and courses recast and restructured in the light of recent development elsewhere and especially with a view to make them socially more relevant and useful. The Board has set up a sub-committee for the purpose. The report of the sub-committee has before it the consensus arrived at the previous regional-workshops held under the auspices of the UGC and before the revised scheme is finally approved of by the Academic Council, perhaps the recommendations and resolutions of the fourth and the final regional workshop on the subject would also be available.

Hours of Teaching

Until few years ago the college used to function for two hours in the morning and two hours in the evening. The actual hours of instruction were from 6.45 to 8.45 A.M. and again from 4.45 to 6.45 P.M. in the evening. The time was divided between lectures and tutorial classes and moot courts. Lectures were held for one hour from 6.45 to 7.45 A.M. and another one hour from 7.45 to 8.45 A.M. was devoted to tutorial classes and moot courts. In the evening also, the first one hour from 4.45 to 5.45 was devoted to lectures and the next one hour to the tutorial classes and moot courts.

But in course of time, the system of holding regular tutorial classes fell in disuse and the time devoted to lectures was increased from one hour to one and a half hours. Thus till the beginning of 1976, the hours of instructions were in the morning from 6.45 to 8.15 A.M. and in the evening from 4.45 to 6.15 P.M. However, with effect from February, 1976, the hours were again increased to two and a quarter hours that is in the morning from 6.45 to 9 A.M. and in the evening from 4.45 to 7 A.M. Now that we have decided to revive the institution of tutors and in fact ten part-time tutors have since been appointed we hope to arrange regular tutorial classes and plan to fully comply with the Bar Council of India's requirement of imparting instructions daily for at least three hours. After these plans are given effect to, the college will function in the morning for three hours from 6.45 to 9.45 A.M. and in the evening also for three hours from 4.45 to 7.45 P.M.

Teaching Staff

The College has always been fortunate enough in having a galaxy of legal luminaries and illustrious members of the Bar on its staff. The present members of staff are highly qualified, experienced and able members of the Bar, have proved their competence in teaching and some of them have indeed established a reputation of being good teachers and we are really proud of them. But it is indeed surprising that inspite of adequate resources available to it, the College in its history of nearly seventy years could not create a faculty of full-time law lecturers. Apart from one whole-time professor who is also Principal of the College and two readers who are Vice Principals, the college has no full-time lecturer; all our lecturers are part-time lecturers. Most of these part-time lecturers are advocates practising in High Court and other Courts, while others are either full-time teachers elsewhere or have a full-time employment somewhere.

The total number of teachers in the college at present is one full-time professor, two full-time readers, seventy-three part-time lecturers and ten part-time tutors. The number of students is approximately 6,000 which means even the part-time lecturers have to put in the same amount of work which is done by the full-time lecturers in other departments/colleges. Notwithstanding this the salary paid to our part-time lecturers is very very low. It was fixed decades ago. There has not been any revision since. It is in no way related to present day economic conditions. Even the visiting team of the University Grants Commission observed that an upward revision was long over due. The University has agreed to revise it and had approached the State Government to approve of the revision.

Plans and Prospects

The University has approached the University Grants Commission and the State Government to create a number of posts of full-time lecturers in law. We have also sought the permission of the State Government to open a teaching department for postgraduate classes in law. An effort is being made to limit the number of students in each class to eighty as required under the Bar Council rules. This will enable us to organise more extra curricular and other academic activities. We also plan to open a cell in the University College of Law for National Social Service which would involve our full-time students in constructive activities. We are also considering the feasibility of opening a legal aid clinic mainly with a view to impart clinical legal education to these of our third year students who have the time, desire and willingness to join it. The clinic will confine its activities to merely giving advice to those who have a legal problem and help promote settlements out of court whenever possible. There is also a possibility of the National Social Service Workers doing the job of spreading what Justice P. N. Bhagwati calls 'legal literacy' that is creating an awareness among the poor and the needy as to what are their rights or to what benefits they are entitled to under the new social welfare laws passed recently.

The College has fine buildings for offices and class rooms, a magnificent hostel for students, well fun gymnasium hall and other sports facilities for the students including a common room and the canteen. We can also boast of a good library. We have funds to give a number of awards, prizes and scholarships. A sincere effort is being made to tone up the academic atmosphere so as to ensure that our students avail themselves of all these facilities and help us regain the lost glory of this institution which was founded by Sir Asutosh with such high hopes. We must rededicate ourselves to realise the ideals that our founders so nobly cherished.

Among the long term plans, there are proposals under consideration for introducing certain diploma courses. Calcutta is a centre of business and industry and there is a large demand for qualified lawyers with specialisation in labour and industrial laws, company law, business law, insurance laws, shipping laws etc. It was with this end in view that when our LL.M. courses were revised recently, necessary provision was made to allow the students to specialise in one or other branch of their choice. Some of the LL.M. students will also be allowed and helped if they choose to write a desertation in lieu of a paper. This will encourage and equip them to pursue higher studies and research leading to the degree of Ph.D. or LL.D. There are many other suggestions and proposals coming from diverse quarters which need to be thoroughly studied so as to see if they are relevant to our needs.⁶

Notes :

1. Reproduced from Hundred Years of the University of Calcutta. (1857-1956). 1957 p. 179.
2. Ibid, p. 224.
3. Ibid, p. 222.

4. Ibid.
 5. Ibid, p. 224.
 6. We are aware of the work being done by the International Legal Center, New York and the Commonwealth Legal Education Association, London and other Committees and Commissions in the U.S.A., U.K. Canada and Australia. There is an earnest quest for redefining the goals of legal education and restructuring and reshaping the system of legal education. We are happy to note that the Government of India has also realised and recognised the need for reshaping our existing system. The present author is at present engaged in writing a paper where he has formulated his own proposals for reform of the system.
-

THE LAWYER : HIS ETHICS, LEARNING AND NOBILITY

The Hon'ble Mr. *Justice* B. N. Banerjee

High Court, Calcutta

Lawyers are all at once the most respected and the most abused members of the society. They are respected because of their reputed ability effectively to plead the cause of the humble and the oppressed and also because of their capacity to champion a right. They are abused because of their mercenary character and also because of the common prejudice that in supporting a cause lawyers are either insincere or dishonest.

In his article on 'The Ethics of Advocacy'¹, Lord Macmillan refers to St. Ives of Brittany and to the mixed feeling with which the name even of that great "Advocate of the poor" is held by the people, as illustrative of one aspect of this prejudice :—

"But the records of 'The Advocate of the poor,' as he was called, appear to have been such as amply to justify his place in the Saints' Calendar, for no one has ever been credited with more zeal in pleading the cause of the humble and oppressed, and he left behind him a tradition of beneficence and uprightness which lives to this day.

Yet even in the case of this lawyer Saint, the popular prejudice against his profession was only grudgingly overcome, and at his yearly festival the people still sing this refrain :
which I may freely render :

An advocate but not a thief,
A thing wellnigh beyond belief.

In pictorial art, too, the Saint is commonly represented with a cat beside him as his symbol, for the reason, as Mr. Baring-Gould tells us in his *Lives of the Saints*, that the cat is regarded 'as in some sort symbolising a lawyer who watches for his prey, darts on it at the proper moment with alacrity, and when he has got his victim delights to play with him, but never lets him escape from his clutches.'

But prejudice is a mist, which, in our journey through the world, often dims the brightest and obscures the best of all the good and glorious objects that meet us in our way. Ignorance is less remote from the truth than prejudice, because the prejudiced man does not so much hold opinions as his opinions hold him.

Great men have protested against prejudices concerning legal profession but none is too

wise to be mistaken and few are so wise as to acknowledge and correct their mistakes, especially the mistakes of prejudice.

BOSWELL : Once asked Johnson, "But what do you think of supporting a cause which you know to be bad?"

JOHNSON : Sir, you do not know it to be good or bad till the judge determines it. You are to state facts clearly; so that your thinking, or what you call knowing, a cause to be bad must be from reasoning, must be from supposing your arguments to be weak and inconclusive. But, Sir, that is not enough. An argument which does not convince yourself may convince the judge to whom you urge it; and if it does convince him, why then, Sir, you are wrong and he is right. It is his business to judge; and you are not to be confident in your opinion that a cause is bad, but to say all you can for your client, and then hear the judge's opinion.

BOSWELL : But, Sir, does not affecting a warmth when you have no warmth, and appearing to be clearly of one opinion when you are in reality of another opinion, does not such dissimulation impair one's honesty? Is there not some danger that a lawyer may put on the same mask in common life in the intercourse with his friends?

JOHNSON : Why, no, Sir. Everybody knows you are paid for affecting warmth for your client, and it is therefore properly no dissimulation : the moment you come from the Bar you resume your usual behaviour. Sir, a man will no more carry the artifice of the Bar into the common-intercourse of society than a man who is paid for tumbling upon his hands will continue to tumble upon his hands when he should walk upon his feet."

The defence put forward by Johnson is a good defence in so far as it goes but is not beyond criticism. To take up Johnson's attitude in defence of the role played by lawyers may end in succumbing to Swift's trenchant criticism of the Bar as "a society of men bred up from their youth in the art of proving by words, multiplied for the purpose, that white is black and black is white, according as they are paid.

A truth which is not understood becomes an error; and it is easier to see the error than to find the truth, because the former lies on the surface and is easily seen, while the latter lies in the depth where few will search. Praise and abuse have been hurled on lawyers by critics, who were or are out to find fault with each other and everyone wished or wishes to have truth on his side but few liked or likes to be on the side of the truth.

If the prejudicial criticism of lawyers is wholly true, then the honour and respect shown to great leaders of the Bar becomes a strange inconsistency. Lord Macmillan in his article on "The Ethics of Advocacy" put two thought provoking questions :—

- (1) "Were they all ignoble hirelings engaged in the sordid business of prostituting their great abilities in the promotion of injustice and untruth?"
- (2) "If the nature of their calling be so ignoble, how comes it that their names are inscribed in the nation's Roll of Honour among the foremost champions of truth, honour and liberty?"

It may not be easy even for ruthless critics to give a satisfactory answer to the two questions. Let us take, for example, our own State, West Bengal and the present century. Were Sir Ashutosh Mookerjee, Dr. Rashbehari Ghosh or Deshbandhu Chittaranjan Das, all great lawyers of their time, any the worse men than any body else? If we try to omit their names from West Bengal's Roll of Honour, we lose a good deal to be proud of.

The explanation to all this lies in the fact that there is a good deal of misconception in the popular mind as to the true role of lawyers in society. This is again due to the fact that the severest critics of lawyers have been non-lawyers and few lawyers have indulged in self-criticism.

Gibe against lawyers because of their mercenary character is a cheap form of criticism. Everybody is mercenary in the sense that a lawyer is—a medical man, an engineer, a scientist in the employment of a government department or of an academic institution and a professor of humanities. The fact that a lawyer charges for his labour is not an uncommon vice in him alone.

Then again the fact that an advocate has at times to serve a bad cause is more his misfortune than his vice. His position in society is that of a cab-man on the taxi-stand bound to answer the first hail.

In India, alike all other countries which follow the English system, an advocate (1) must accept any case which he is asked to take up, subject to certain exceptions to which reference will hereinafter be made, and (2) having accepted a case his duty is to present it to the best of his ability.

Illustrative of the duty of an advocate to accept the brief of anybody who wants to engage him, W. W. Boulton, quotes the well-known defence, by Lord Erskine, of his conduct in defending the unpopular author of "The Rights of Man," Thomas Paine² :—

"In the 1920's two eminent counsels, who were also members of Parliament, accepted instructions to appear on behalf of certain public men to whom they were politically opposed, and whose character had been attacked in connection with matters which had aroused the bitterest party feeling. A great controversy arose and received much publicity in 'The Times' as to whether the counsel concerned had acted correctly in accepting the instructions. The suggestion was made that the rule whereby a barrister is under the duty to accept any brief, in the Courts where he professes to practise, should be discarded where obedience to it would involve dereliction of higher duties to the State. It was contended that by taking up these cases the counsels in question had rendered impossible the performance of their duties as Members of Parliament to their constituencies and to the public. But in the eyes of the profession the two counsels acted entirely in accordance with their duty as members of the Bar.

"The rule that a barrister must accept any brief, in the courts in which he professes to practise, has its exceptions. The first applies where counsel is faced with a conflict of interests in the shape of special circumstances which would render it difficult for

him to maintain his professional independence or would otherwise make the acceptance of instructions incompatible with the highest interests of Justice.

“The second exception to the general rule as to the acceptance of briefs applies where counsel finds that he would be personally embarrassed. Embarrassment may arise in two different ways. The first is where counsel finds himself in possession of confidential information from a source other than his instructions.

“Secondly, embarrassment may arise out of some personal relationship between counsel and a party to the proceedings. Although no written rule is to be found, it is well established that if because of such relationship counsel would find it difficult or impossible to maintain the independence and objectivity which is expected of him in the performance of his duty to his client, he is justified in declining to act and, indeed, ought not to do so.”

In India, Art. 22(1) of the Constitution recognises the right of every prisoner to consult and to be defended by a legal practitioner of his choice. This is a matter of fundamental right with every citizen of the Indian Union but this right would have been nowhere if, under their own ethical standards, lawyers were not bound, subject to the several exceptions here-in-before stated, to accept every brief offered to them. The Constitution does not compel lawyers to accept everybody's brief, but their own convention does.

The duty of an advocate having once accepted a brief is :—

- (a) fearlessly to uphold the interests of his client without regard to any possible unpleasant consequence to himself and to say all that can be legally said in his client's favour;
- (b) in defending the prisoner, to assert the client's rights and to protect his liberty or life by the free and unfettered statement of every fact and the use of every argument that may be legitimately put forward. In doing so he must not succumb to his own private opinion of the guilt of the prisoner, or be swayed by public opinion;
- (c) to make the most of every flaw and every gap in the net which entangles the prisoner. But he is not entitled to attribute wantonly or recklessly to another person the crime with which his client is charged unless the facts or circumstances of the case raise at least a reasonable suspicion that the crime may have been committed by the person on whom he imputes the guilt.

In the discharge of his duty in a criminal trial, an advocate faces a very embarrassing problem when his client confesses the guilt to him and even then desires to be defended. This problem prominently cropped up in public discussion in the famous trial before the Central Criminal Court in 1840, in which a manservant named Courvoisier was accused of the murder of his master, Lord William Russel. At one stage of the trial, when evidence had come to light to connect Courvoisier with crime, the accused sent for his counsel Charles Phillips, and confessed his guilt to him. Lord Macmillan, in his article here-in-before referred to, gives a critical description of the situation which I quote below :

"I have sent for you, gentlemen," said he, "to tell you I committed the murder." When I could speak, which was not immediately, I said, "Of course then you are going to plead guilty." "No Sir," was the reply, "I expect you to defend me to the utmost." So perturbed and distressed was Phillips as to his duty in this appalling situation, that he sought an interview with Baron Parke, who, although not trying the case, had been sitting on the Bench with Lord Chief Justice Tindal. At this interview Phillips tells us that Baron Parke "requested to know distinctly whether the prisoner insisted on my defending him; and, on hearing that he did, said I was bound to do so, and to use all fair arguments arising on the evidence. I therefore retained my brief." The advice was unquestionably right, but the difficulty of following it to the latter imposed a task of extreme delicacy upon Phillips. His manner of discharging it brought upon him a storm of virulent criticism. It was said that though he knew that his client was the murderer, he nevertheless sought to suggest to the jury that the guilt lay with another of Lord William's servants whom he of course knew to be innocent, and further that he called the Deity to witness that his client was innocent. Here are the words of his proration :

"But you will say to me, if the prisoner did not do it, who did it? I answer, ask the Omnipotent Being above us who did it. Ask not me, a poor finite creature like yourselves. Ask the prosecutor, Who did it. It is for him to tell you who did it, and until he shall have proved, by the clearest evidence, that it was the prisoner at the Bar, beware how you imbrue your hands in the blood of that young man.

It is a pretty problem whether in speaking these words and other words which he used in the course of his address to the jury, Phillips stepped outside the legitimate bounds of his duty. The concluding words at least of the passage I have quoted seem unexceptionable. It is fair to say that the presiding judge subsequently expressed the opinion that Phillips had discharged his difficult task without transgressing the limits within which he was bound in the circumstances to confine himself. The interest of the case lies for our present purpose in the public discussion to which it gave rise, and which did much to define with precision the duty of an advocate so situated. All were agreed that he would not have been entitled to suggest that anyone else was guilty of the crime, and that he certainly would have had no right to pledge to the jury his own belief in his client's innocence. To have done the first of these things would have been to do a cruel wrong to the innocent; to have done the latter would have been to perpetuate a fraud. "Indeed no counsel is ever entitled to express his own belief in his client's innocence. The moment he does so he steps outside his role of advocate."

In the year 1915, the English Bar Council gave its opinion (which was approved by Sir Edward Carson and Lord Finlay) as to what should be done by an advocate, when he is asked to defend, on a plea of not guilty, a prisoner who has confessed to his counsel that he did commit the offence charged. The Bar Council dealt with the topic under two heads :—

- (a) when the confession was made before the trial;
- (b) when the confession was made during the trial or in such circumstances that the advocate could not withdraw without seriously compromising the position of the accused.

In cases falling under the first head the Bar Council was of the opinion :—

“It is most undesirable that an advocate to whom the confession has been made should undertake the defence, as he would most certainly be seriously embarrassed in the conduct of the case, and no harm can be done to the accused by requesting him to retain another advocate.”

In cases falling under the second head, the Bar Council was of the opinion :—

“(1) That every punishable crime is a breach of common or statute law by a person of sound mind and understanding; (2) that the issue in a criminal trial is always whether the accused is guilty of the offence charged, never whether he is innocent; (3) that the affirmative rests on the prosecution.” The duty of the advocate for the accused is ‘to protect his client as far as possible from being convicted except by a competent tribunal and upon legal evidence sufficient to support a conviction for the offence with which he is charged.’

“The ways in which this duty can be successfully performed with regard to the facts of a case are (a) by showing that the accused was irresponsible at the time of the commission of the offence by reason of insanity or want of criminal capacity; or (b) by satisfying the tribunal that the evidence for the prosecution is unworthy of credence, or, even if believed, is insufficient to justify a conviction for the offence charged; or (c) by setting up in answer an affirmative case.”

The Bar Council was not called upon to deal with the types of cases in which there is an extra-judicial confession by the accused. In such a case, an advocate may not feel as embarrassed as when the confession is directly made to him. There are enough ways and means provided by the Criminal Procedure Code in India and, in the Codes of the other countries, in which the English system of criminal trial prevails, to get rid of such extra-judicial confession and an advocate may successfully put such confession outside the legal evidence against the accused. It may not be absolutely undesirable of an advocate to accept a brief, containing an extra-judicial confession.

Such being the standard of duty of an advocate, in the conduct of a case, it is not right sweepingly to level a charge of dishonesty or insincerely against professional lawyers. But it must be admitted that there are lawyers who do not realise their own responsibilities and offenders against professional ethics are not unknown. These mercenary practitioners are the shame of the profession and the wicked boys in the family of lawyers. Of them Colton, the English clergy, truly said, “Pettifoggers in law, and empirics in medicine, whether their patients lose or save their property or their lives, take care to be, in either case, equally remunerated; they profit by both horns of the dilemma, and press defeat no less than success into their service. They hold, from time immemorial, the fee simple of a vast estate, subject to no alienation, diminution, revolution, or tax—the folly and ignorance of mankind.”

Having dealt with the prejudices against lawyers, it is necessary now to examine their claim to belong to a learned and a noble profession.

H.D.C. Pepler, a poet, wrote an uncomplimentary lyric on lawyer's education :—

“The law the lawyers know about
Is property and land;
But why the leaves are on the trees,
And why the winds disturb the seas,
Why honey is the food of bees,
Why horses have such tender knees,
Why winters come and rivers freeze,
Why faith is more than what one sees,
And Hope survives the worst disease,
And Charity is more than these,
They do not understand.”

Pepler may be right in saying that lawyers are not great scholars in botany, physics, zoology, physiology or philosophy. They do not claim proficiency either in science or in philosophy. But theirs is a special learning, which is not in the domain either of physical scientists or academic philosophers, or for the matter of that of kings and of men of politics.

In a conference between King James-I and the Judges of England, His Majesty asked, “But have I not reason as well as my judges?” The answer to question given by Coke, I set out below³ :—

“To which it was answered by me that true it was, that God had endowed his Majesty with excellent science, and great endowments of nature; but his Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason, but by the artificial reason and judgment of law, which law is an art which requires long study and experience before that a man can attain to the cognizance of it.”

Coke however said all that with reference to judges but the observation equally applies to professional lawyers.

Hobbes⁴ made a devastating criticism of Coke's claim to legal learning based on artificial reasonings :—

“But the doubt is of whose reason it is that shall be received for law. It is not meant of any private reason, for then there would be as much contradiction in the laws as there is in the schools; nor yet, as Sir Edward Coke makes it, an ‘artificial perfection of reason, gotten by long study, observation, and experience,’ as was his. For it is possible long study may increase and confirm erroneous sentences, and where men build on false grounds, the more they build, the greater is the ruin; and of those that study with equal time and diligence, the reason and the resolutions are and must remain, discordant, and therefore it is not that *jurisprudentia* or wisdom of subordinate judges; but the reason of this our artificial man and his command that maketh law.”

But Hobbes overlooks that law is not an exact science. It has nothing to do with scientific axioms or formulae but everything with the day to day concerns of men, their struggles and rivalries, sentiments and emotions, rights and wrongs. Application of law to these materials cannot be done with the precision as in a scientific laboratory. Neither justice nor equity can be laid to the line of the plummet. One cannot contend against the mathematical fact that two and two make four. But in the human affairs, with which Law Courts have to deal, there is almost always something to be said either way.

The learning of a lawyer consists primarily in knowing what the law is and in being able to say as much as can be said under the law in favour of his client. There are, of course, some lawyers who know a good deal more, namely, what the law was and what it should be. They are the jurists and philosophers of law, who add to their knowledge of pure law—the history, economics, politics and philosophy of law. This is the measure in which lawyers can be said to be learned.

So far as the lawyer's claim to nobility of profession is concerned, De Tocqueville rightly said, "By birth and interest lawyers belong to the people ; by habit and taste to the aristocracy; and they may be looked upon as the natural bond and connecting link of the two great classes of society.—They are attached to public order beyond every other consideration, and the best security of public order is authority.—If they prize the free institutions of their country much, they value the legality of these institutions far more.—They are less afraid of tyranny than of arbitrary power."

The great brotherhood of lawyers is a brotherhood in the proper sense. They address each other as learned friends in their professional talks. As adversaries in law they strive mightily but they eat and drink as friends. Daniel Webster described lawyers on opposite sides as two parts of shears; they cut what comes between them, but not each other.

This brotherhood is by code of conduct or by law bound to observe an honourable conduct. The Indian Bar Councils Act, for example, authorises High Courts to reprimand, suspend or remove from practice any advocate of the High Court whom it finds guilty of professional or other misconduct. The word 'misconduct' is a sufficiently wide expression : it is not necessary that it should involve moral turpitude. Any conduct which in any way renders a man unfit for the exercise of his profession or likely to tamper or embarrass the administration of justice may be considered as misconduct. If it be found that an advocate has been guilty of such conduct as makes him unworthy to remain in the profession, he is to be struck off the roll.

The Supreme Court of India had in recent times occasion to pronounce on the lapses from the high moral standards of lawyer's profession and I take this opportunity to refer to a few of them.

In the matter of Mr. 'G', a Senior Advocate, (A.I.R. 1954 S.C. 557), the Supreme Court had to consider the conduct of an Advocate who had entered into an agreement with his client under which he was to receive 50% of any recoveries he might make in the legal proceedings in respect of which he was engaged. In condemning his conduct, the Supreme Court observed :—

“To use the language of the Army, an Advocate of this Court is expected at all times to comport himself in a manner befitting his status as an ‘officer and a gentleman.’ In the Army it is a military offence to do otherwise (see section 45 of the Army Act, 1950) though no notice would be taken of ungentlemanly conduct under the ordinary law of the land, and none in the case of a civilian. So here, he is bound to conduct himself in a manner befitting the high and honourable profession to whose privileges he has so long been admitted; and if he departs from the high standards which that profession has set for itself and demands of him in professional matters, he is liable to disciplinary action.

Now it was not disputed that, so far as English Barristers are concerned, this sort of agreement was once taboo both in England and in India. Even when they worked in the mofussil in India and did the kind of work that would be done by solicitors in England and in the Presidency Towns in India, they could not enter into an engagement of this kind, for even solicitors in England are forbidden from making such bargains (see Cordery’s *Law Relating to Solicitors*, fourth edition, p. 342). But, it was argued, this rule only applied to members of the English Bar, and in any event it was abrogated in India in 1926.

We will first examine whether there was a difference between Barristers and other classes of lawyers. This point was raised in the Punjab in 1907 but was rejected by a majority of seven Judges to two in a Full Bench of nine Judges in *Ganga Ram vs. Devi Das*, 61 Pun. Re 1907 p. 280. But it is to be observed that even the two dissenting Judges agreed that an engagement of the present kind was not open to a member of the Punjab Bar. Lal Chand, J. (who dissented) said at p. 331 :

‘I am in perfect accord with the Hon’ble Chief Judge that stipulation to receive a “share in result of the litigation” is different from a stipulation to be paid a fee contingent on success.’

The other dissenting Judge, Chatterjee, J., agreed with him but even as regards the practice which these two learned Judges thought permissible at the date of their decision, Chatterjee, J., said at p. 299 :

‘It must not be supposed, however, that I am in favour of the practice. I should on the whole prefer its abolition.....’

We agree with Chitty, J., at p. 326 that there was no justification even at that date for seeking to apply one set of rules to one branch of the profession and another to another. As he said—

‘What is right or wrong for the one must be right or wrong for the other,’

or, as Sir Lawrence Jenkins, C. J., put it in—*In re Bhandara*, 3 Bom LR 102 at p. 111;

‘For common honesty there must be no sliding scale even in the mofussil.....’ I consider that for an Advocate of this Court to stipulate for, or receive, a remuneration proportioned

to the results of litigation or a claim whether in the form of a share in the subject-matter, a percentage, or otherwise, is highly reprehensible, and I think it should be clearly understood that whether his practice be here or in the mofussil he will by so acting offend the rules of his profession and so render himself liable to the disciplinary jurisdiction of this Court.”

Then again in the case of *Manak Lal vs. Dr. Prem Chand*, A. I. R. 1957 S. C. 425, where an Advocate was charged with professional misconduct in having got a false stay order written by the clerk by improper means and thereby managing to get an illegal and undue advantage for his client, the Supreme Court upheld the punishment passed on the Advocate with the following observations :—

“In the administration of law and justice, lawyers have to play an important part. They are, in a sense, officers of the court and as such they are given special rights and privileges. The profession of law enjoys high and respected status and reputation of its own and this status carries with it corresponding obligations. Naturally the Bar must zealously safeguard the highest standard of professional morality and integrity. In fairness to the Bar, we ought to add that cases of this nature are very rare but unfortunately when such cases come before the courts, the courts must take a serious view of such reprehensible lapse and must pass deterrent orders. It is our duty to express our disapproval of such unworthy practices as emphatically as we can because the legal profession must be saved from persons who do not feel any hesitation in corrupting public officers by unworthy and illegal considerations for the temporary and immediate benefit of their clients.”

In the case of *Lalit Mohan vs. Advocate General*, A.I.R. 1957 S.C. 250, the Supreme Court condemned the conduct of an Advocate who had scandalised a Court in an unworthy manner and observed as follows :—

“A member of the Bar undoubtedly owes a duty to his client and must place before the Court all that can fairly and reasonably be submitted on behalf of his client. He may even submit that a particular order is not correct and may ask for a review of that order. At the same time, a member of the Bar is an officer of the Court and owes a duty to the Court in which he is appearing. He must uphold the dignity and decorum of the Court and must not do anything to bring the Court itself into disrepute. The appellant before us grossly overstepped the limits of propriety when he made imputations of partiality and unfairness against the Munsif in open Court. In suggesting that the Munsif followed no principle in his orders, the appellant was adding insult to injury; because the Munsif had merely upheld an order of his predecessor on the preliminary point of jurisdiction and Court fees, which order had been upheld by the High Court in revision. Scandalizing the Court in such manner is really polluting the very fount of justice; such conduct as the appellant indulged in was not a matter between an individual member of the Bar and a member of the judicial service; it brought into disrepute the

whole administration of justice. From that point of view, the conduct of the appellant was highly reprehensible.”

Lastly, in the case of *Shri 'M', an Advocate of the Supreme Court of India*, A.I.R. 1957 S. C. 149, the conduct of an Advocate who had refused to refund the surplus paper-book costs, withdrawn by him on behalf of his client, came up for consideration. The Supreme Court re-stated the correct rule of conduct in the following language :—

“We have no doubt in our mind that the high standards of the profession demand that when the moneys of the client came into the possession of an Agent or an Advocate, otherwise than as earmarked fees, he has to treat himself as in the position of a trustee for the client in respect of the said moneys. Even if he has a lien on such moneys, it would be improper for him to retain, i.e., to appropriate the same towards his fees, without the consent, express or implied, of his client or without an order of the Court. It may be that in certain circumstances he is entitled to exercise a lien, but he has to give reasonable intimation both of the fact of moneys having come into his hands and of the exercise of his lien over them until his account is settled. If there has been no prior settlement of fees he cannot constitute himself a judge in his own cause as to what would be the reasonable fee payable to him. This position of trusteeship in respect of moneys of the client in his hands is all the greater where the moneys represent the unspent balance of what was given for a specific purpose, such as for payment of printing charges, as in this case. On any such unspent balance, it is well settled, that he has no lien either under the common law or by the statute. (See Cordery's Law relating to Solicitors (4th Edition) page 456 and Halsbury's Laws of England (2nd Edition), Vol. 31, page 238, para. 265). In this case it appears to us that the retention and appropriation of the money by Shri 'M' without intimation to the client and without sending a bill to him for his fees or applying for taxation even after disposal of the appeal constitutes professional misconduct.”

The claim to nobility of lawyer's profession may be factorised :—

- (a) in gentlemanliness, particularly truthfulness, uprightness and decorous behaviour;
- (b) in scrupulous honesty in all dealings with the client including receipt and disbursement of funds from the client;
- (c) in fearless conduct of his client's case regardless of personal fear or favour;
- (d) in discharging his duties manfully but without resort to foul practices or low-down tactics.

Mr. Boulton in his article (*supra*) deals with the clash between the barrister's duty and his duty to the Court in the following way :—

“Counsel always has to bear in mind that in addition to his duty to his client, he also has a duty to the court and these two obligations sometimes appear to be in conflict. He must on no account deceive or mislead the court, and this rule extends to the point

of making it obligatory for counsel to draw the attention of the court to any relevant statutory provision or binding decision which is immediately in point whether it be for or against his contention. But counsel is under no duty to disclose facts known to him regarding his client's character or antecedents, nor to correct information which may be given to the court by the prosecution if the correction would be to the client's detriment. Counsel ought always to treat the court with courtesy and deference; and this applies equally to a bench of magistrates in the country as to the highest court in the land."

It is on these virtues that the lawyer's title to nobility depends. The virtues are such as anybody should be proud to possess.

Dispassionately examined the role of lawyers in society is two fold. On the one hand they represent a more or less powerful body, with special knowledge of the working of the legal systems, who can and often do exercise considerable influence on society as a whole. They fight for the distressed and battle against arbitrariness in centres of power within the society. The executive is kept within its bounds, the legislature within its powers and the judiciary is restrained from arbitrariness often because of the constant vigil of the lawyers and their fearless forensic criticism. On the other hand, the legal profession discharges the unique function of mediating between the individual and the law of society as a whole and of translating into effective action the legitimate aspirations of the individual, upon whose fundamental rights and dignity the Rule of Law is based. One should think twice before maligning lawyers as a class.

Notes :

- 1) *Jurisprudence in Action* (Baker, Voorhis & Co.), p. 303..
 - 2) W.W. Boulton—On the Bar in England and Wales (*Journal of the International Commission of Jurists*, Vol. I, No. 1).
 - 3) Conference between King James-I and the Judges of England; (1612) 12 Rep. 63.
 - 4) *Leviathan*, Cap. XXVI.
-

FEDERAL-STATE RELATIONSHIP UNDER THE INDIAN CONSTITUTION

Dr. Debiprosad Pal

LL.D., D.LITT., Formerly Judge, High Court, Calcutta

Federalism embodies a principle of reconciliation between two divergent tendencies, one is the widening range of common interests and the other is the need for a local autonomy. It seeks to combine a measure of unity with a measure of diversity. Lord Acton observed that of all checks on democracy, federalism has been the most efficacious and the most convenient. The federal system limits and restrains the sovereign power by dividing it and by assigning to the Government only certain defined rights. Federalism as a principle is not rigid in its character. In its application to the concrete political problems it should be understood as a relative and dynamic principle.

The Indian Constitution proclaims India to be an Union of States. Therefore, States as such are constitutionally recognised units. The Union is not a Union of enumerated powers granted by the States nor are the States in India creation of the federation. Both the Union and the States are created by the Constitution, both derive their respective authority from the Constitution. The one is not subordinate to the other in its own field, the authority of one is coordinate with that of the other.

Under the Indian Constitution the scheme of the division of power is almost the same as was adopted under the Government of India Act, 1935. Three lists have been provided for in the Seventh Schedule to the Constitution, the Union List, State List and the Concurrent List. The Union List consists of 97 items, the State List consists of 66 items and the Concurrent List consists of 47 items. The Union List consists of those items like Defence, armed forces, foreign affairs and other subjects which are of common interest to the Union and in respect of which uniformity of legislation throughout the country is considered to be desirable and essential. The subjects in the State List have been selected on the basis of the local and particular interests. The Concurrent List provides for those items in respect of which uniformity in legislation is considered to be desirable although not essential. So long as Parliament does not pass any law on any of these items, the State may pass any law they like on the same. But once the Parliament enacts a law on such items, the Parliamentary law shall prevail over any State law in this regard. There is, however, one exception viz.: if a later law of the State Legislature on any

items of the Concurrent List has been reserved for the consideration of the President and receives his assent the later law of the State Legislature shall prevail over the earlier law of the Parliament.

The residuary powers of Legislation are vested in the Union. This power includes power of making laws imposing any taxes not mentioned in any of the lists, to establish additional Courts for the better administration of laws made by it on any of the items included in the Union list. The Parliament has the exclusive power to give effect to any treaty, agreement or convention with any country or international body.

Articles 249 of the Constitution authorises the Parliament to make laws in respect of a matter in the State List, if the Council of State declares by a resolution supported by 2/3rd of the members present and voting that it is necessary or expedient in the national interest that Parliament should make laws with respect to such matters. Such a resolution remains valid for one year, unless the Constitution under which the resolution was passed continues to exist even at the end of one year and another resolution to the same effect is passed. Articles 250 provides that the Parliament may make laws on any items included in the State List for the whole or any part of India while a proclamation of emergency is in operation. Articles 252 gives a special power to the Legislature of two or more States to pass a resolution by members of the House of the Legislature of such States by which the Parliament may be authorised to pass an Act for regulating matters with respect to which the Parliament has no power to make laws, Articles 253 gives the power to the Parliament to make any law for the whole of the territory of India for implementing any treaty, agreement or convention or any decision made at any international Conference.

Article 254 provides that if any provision of a law made by the Legislature of a State is repugnant to any provision of law made by Parliament which Parliament is competent to enact with respect to any matters enumerated in the Concurrent List, then the law made by the Parliament shall prevail and the law made by the legislature of the State shall, to the extent of the repugnancy, be void. Article 254 further provides that if the State Legislature had made a law with respect to one of the matters enumerated in the Concurrent List and it is reserved the same for the consideration of the President and has received his assent, then such law shall prevail in that State over an earlier law made by the Parliament.

It is of the essence of a Federal Constitution that there should be a distribution of the legislative powers of the federation between the Centre and the Provinces. Such scheme of distribution of powers varied with different Constitutions, but even when the Constitution enumerates elaborately the topics on which the Centre and the States could legislate, some overlapping of the fields of legislation is inevitable. For this reason, the constitutionality of the laws made by the Centre and the State come up for decision from time to time and therefore, to decide whether an impugned legislation is intra-vires, the doctrine, that regard must be had to its pith and substance was evolved. If a Statute is found in substance to relate to a topic within the competence of the Legislature, it should be held to be intra-vires, even though it might

incidentally trench on topics not within its legislative competence. The extent of the encroachment on matters beyond its competence may be an element in determining whether the legislation is colourable that is, whether in the guise of making a law on a matter within its competence, the Legislature is in truth making a law on a subject beyond its competence. But where that is not the position, then the fact of encroachment does not affect the vires of the law even as regards the area of encroachment. To ascertain the true character of the legislation which is impugned on the ground that it is ultra vires the powers of the Legislature which enacted it, one must have regard to the scope and effect of its provisions. It would be quite an erroneous approach to the question to view such a statute not as an organic whole but as a mere collection of sections, then disintegrate it into parts, examine under what heads of legislation those parts would severally fall, and by that process determine what portions thereof are intra-vires and what are not. Each entry in the lists which has a category or head of the subject matter of the legislation, must be construed not in a narrow or restricted sense but as widely as possible so as to extend all ancillary or subsidiary matters which can fairly and reasonably be comprehended.

Repugnancy falls to be considered when the law made by the Parliament and the law made by the State Legislature occupy the same field because if both the pieces of legislation deal with separate and distinct matters though of a cognate and allied character, repugnancy does not arise. Repugnancy is dealt with in our Constitution under Article 254.

Nicholas refers to three tests of repugnancy :—

1. There may be inconsistency in the actual terms of the competing Statutes.
2. There may be no direct conflict, a State law may be inoperative because the Commonwealth law or the Award of the Commonwealth Court, is intended to be a complete exhaustive Code.
3. Even in the absence of intention, a conflict may arise when both State and Commonwealth seek to exercise their powers over the same subject matter.

If the dominant law has expressly or impliedly evinced its intention to cover the whole field, then a subordinate law in the same field is repugnant and therefore, inoperative. Whether and to what extent in a given case, the dominant law evinces such an intention must necessarily depend on the language of the particular law.

One of the difficult problems under a federal system is the adjustment of administrative relations between the Union and the States. In the absence of clear provisions in the Constitution, considerable difficulty is felt by the Union and the States in the discharge of their responsibilities. The makers of our Constitution decided to include detailed provisions so as to avoid clashes between the Union and the States in the administrative field. The pattern has been established on the basis of the provisions of the Govt. of India Act, 1935. Article 256 provides that the executive power of every State is to be exercised in such a way as to ensure compliance with the laws made by the Parliament. Further, the Union Executive is empowered to give such directions to a State as may appear to the Govt. of India to be necessary for the purpose. The idea of the Union giving directions to the States is foreign to most federations.

Articles 262 provides that the Parliament may by law provide for the adjudication of any dispute or complaint with respect to the use, distribution or control of the waters of any inter-State river or river valley. The importance of this provision lies in the context of the inter-State multi-purpose river valley projects like the Damodar Valley Corporation.

The Constitution provides also under Articles 263 for the establishment of a Council charged with the duty :—

1. To enquire into and advise upon disputes which may have arisen between States.
2. To investigate and discuss subjects in which some or all States or the Union and one or more of the States have a Common interest.
3. To make recommendations upon any such subjects and in particular, recommendations for the better co-ordination of policy and action with respect to those subjects.

The President is empowered not only to establish such a Council but also to determine its organisation and procedure and to define the nature of the duties.

Under the Indian Constitution a single citizenship has been established unlike the dual citizenship recognised in the American federal system. The Indian Constitution envisages the integrated judicial system unlike the dual system of judiciary in the U.S. and Australia. The other feature of the Indian Constitution is the ability to adapt itself to changing circumstances. The process of change over does not involve any complicated constitutional process. Appointments of the Judges of the High Courts are made by the President and the Judges can be transferred from one High Court to another. The heads of the States are the Governors who are appointed by the President and they hold office during his pleasure. The creation of All India Services i.e. Indian Administrative and Police Services ensures the uniformity of the administrative system and maintains a common administrative standards without impairing the federal principle. Establishment of an Election Commission as also Comptroller and Auditor General also strengthens the federal executive.

No other federal constitution provides for such elaborate provisions with respect to the relationship between the Union and the financial field. The establishment of a Finance Commission for the purpose of allocating and adjusting the receipts from certain sources is an original contribution in the extremely complicated aspect of federal relationship.

The Indian Constitution lays down a broad scheme for the distribution of revenue resources between the Union and the States. The basic principles that guide the allocation of resources between the federation, the units are efficiency, adequacy and suitability. The Constitution attempted a compromise involving two procedures—(i) the allocation of revenue between the Union and the States and (ii) distribution of grants-in-aid.

The principle of reciprocal immunity of instrumentalities springs from the very basis of a federal system. It recognises the right of both the Union and the State Governments to exist and effectively function as Governments. Under Article 285 the property of the Union is exempt from all taxes imposed by a State or any local authority unless Parliament provides otherwise.

There are two more constitutional prohibitions upon the States in the matter of imposing taxes on Union activities. These relate to the consumption of electricity and water by the Union or its agencies. The principle of reciprocal immunity is partially recognised in our Constitution under Article 289. According to this, property and income of a State are exempt from Union taxation. But this general prohibition does not stand in the way of Parliament's power to impose any tax in respect of a trade or business of any kind carried on by or on behalf of the Government of a State.

The freedom of inter-State trade and commerce in a federation has presented delicate problems not only in our country but in many other Federal Constitutions like those of America and Australia. The founding fathers of the Indian Constitution were confronted with the twofold problems of achieving a federal economic and fiscal integration and that of fostering the development of areas which were under developed without creating too many preferential or discriminative barriers. In evolving an integrated policy the Constitution has taken into account three major considerations. First, in the larger interest of India free flow of trade, commerce and inter-course both State and intra-State is guaranteed. Secondly, the regional interests have not been ignored altogether and lastly, a power of intervention by the Union in any case of crisis to deal with particular problems has been provided.

An analysis of the salient features of Indian federalism has led to divergent views on the subject. In the words of Prof. Wheare, the Indian Constitution establishes a system of Government which is almost "Quasi-Federal". Prof. Jennings has characterised the Constitution as a federation with a strong centralising tendency. Prof. Nicholas thinks the Indian Constitution to be a federal one. It is true that the Indian Constitution has made the centre more powerful. If the essence of the federal principle consists in the "method of dividing powers" so that the general and regional Governments are each, within a sphere, coordinate and independent, the Indian Constitution in spite of its accent on the centre has closely maintained the federal scheme. Almost in all federal constitutions there has been a notable swing in favour of concentration of power in the Central Government. Prof. Schwartz in his *American Constitutional Law*, after reviewing the constitutional process of Canada and Australia has pointed out the growing centralising trends in those federations. The framers of the Indian Constitution took lessons of the political experience of the federal constitutions of other countries. India being an underdeveloped country had to accelerate the pace of economic development by a planned mobilisation of national resources. The integrity and solidarity of the nation was also in the mind of our founding fathers because of the disintegrating and fissiparous tendencies at the formative stage of our independence. In evolving the Indian federation the approach of the framers of the Constitution was a pragmatic one and not motivated by any abstract constitutional Puritanism. It is in this background that the emergency provisions of the Constitution conferring large powers upon the centre have to be considered. The true character of the Indian federation can be considered not when the nation is in peril but when the Constitution works under normal conditions. The Indian Constitution in spite of its emphasis upon a strong centre is, in its essence, federal.

PATRIA POTESTAS

Balai Chandra Paul

M.A., B.L., Ph.D. (Lond), Barrister-at-Law, Reader and Vice-Principal

Vedic society dominated by the male is a feature which is clearly traceable to a still earlier period. The patria potestas is not a peculiar phenomenon found in Indo-European society, it is found in early Chinese Society¹ as well.

Under the laws of Rome both the son, natural or adopted, and the wife, were classed not as a person but as thing in the family of the pater familias over whom the latter exercised absolute jurisdiction of life and death. The position of a married woman among the Romans compared favourably with her position in Greece, but in contradistinction to a wife's position in Greece the wife in Rome was the domina of her household.

Vedic society was founded upon the patriarchal family, is that to say, the relationship was counted through the father². Indeed, the family was both patripotestal and patrilocal. As in ancient Rome, in the Vedic period too, the wife on marriage left "her old agnatic family, so as to pass under the power of the head of that family, thus standing to her husband, if he happened to be himself the head of his family, in the position of a daughter"³. If she was not the wife of the patriarch called the pater familias then she along with other members of the family came under his despotic sway. From a legal standpoint the sons of the pater familias had no rights in the family more than the slaves attached to the household. In ancient Rome the right of the father to decide as to whether his child should live or be sold was implied in the patria potestas⁴.

The despotic nature of the rule of the pater familias over the wife is apparent from the custom common to both the Romans and Indians in accordance with which it was within the discretion of the father to "take up" the child which his wife bore to him and to decide there by whether the child should live or die. Though it is not quite so apparent in India, it has been pointed out that a Rig Vedic passage (V.2.1.) seems to imply that the mother "gives" the child to the father⁵. Again it has been suggested that another passage in the Taittiriya-Samhita⁶ points to the practice of exposure of daughters⁷ and implies the custom of the child being taken up by the father.

An analytical study of the Vedic society will reveal the despotic nature of the patria potestas of the pater familias. It has already been stated hereinbefore that this particular criterion

of despotism did not originate in nor was it confined to the Vedic period. It cannot be clearly said that the Indo-European woman, under the potestas of their husbands, were in any way equal with them. On the contrary, in the primitive Indo-European period, the man was the absolute master, and the wife, whether acquired by capture or purchase, was merely a servant and bearer of children, and this fact is borne out by the absence of an Indo-European name for the wedded pair⁸. Under the laws of Rome if the wife was Seduced by another, the action maintainable against the seducer was not that for adultery but one for theft.

Concerning the position of women in the Vedic period Datta, however, says, "Still more grateful to us is the picture of cultured ladies who were themselves Rishis, and composed hymns and performed sacrifices like men. For there were no unhealthy restrictions against women in those days, no attempt to keep them secluded or uneducated or debarred from their legitimate place in society"⁹. What was more, a wife could not only meet the people who assembled at her husband's house and attend feasts and sacrifices gaily dressed and decked with ornaments, but also had an executive authority over the slaves and farm-labourers as the rightful mistress of the household;¹⁰ so much so that "a wife and husband became by their marriage Dampati or "two masters of the house"¹¹. However exalted the position of women in the Vedic Age may apparently seem, it was never on the par with that of the pater familias. In social intercourse and in household matters a wife was, however, allowed limited liberties.

The aforesaid limited liberties are not found as stated hereinbefore in the Indo-European society wherein the position of a wife was not as much exalted as in the Vedic society, though it is a fact that what was the essence of marriage in the Vedic period was also the essence of marriage in the Indo-European society. Marriage in the Vedic period was a sacrament; so was the marriage of the Romans who denoted the communion of the married life by the necessary elements of fire and water. What is more, the bride went to her husband's house after her marriage, and not vice versa, was a universal Indo-European custom and it cannot be said that the custom originated in the Vedic period. The actual carrying away of the wife to her husband's house in Vedic marriage has a close parallel for it in the Roman "deductio in domum"¹². Schrader says, "I am convinced that only the connection of the daughter-in-law with the husband's relatives, and not the connection of the son-in-law with the relatives of the wife, can be established by Indo-European equations.....we find that the former (that is, the daughter-in-law in the husband's family) alone has a just claim to be descended from the Indo-European times"¹³. Nevertheless, the influence of patria potestas on the Vedic society existed in a large measure.

A vedic householder was supposed to re-marry on the death of his wife because the paramount duty of the householder, the daily offering of the agnihotra, could not be carried on without the wife; but, curiously enough, when a Vedic husband died the wife must immolate herself upon the husband's funeral pyre⁽¹⁴⁾. In the case women, therefore, the cup was dealt in another measure.

It is further apparent that the Vedic society under the influence of patria potestas was unwilling at first to invest women with proprietary rights in immovable properties; their rights of exclusive and full ownership in movable properties inter alia ornaments, jewellery were fully recognised. Concerning this Mulla says, "Summarizing the Smriti texts we may say that it is only gifts obtained by a woman from her relations and her ornaments and apparel which constitute her stridhana and that the only sorts of gifts from strangers which came under that denomination are presents before the nuptial fire and those made at the bridal procession. But neither gifts obtained from strangers at any other time, nor her acquisitions by labour and skill, constitute her stridhana" (15). It is, however, not certain, if women in Vedic society, were allowed to alienate even such movable properties without the concurrence of their husbands.

Reference:

1. Johnston, R. F., *Lion and Dragon in Northern China*, London, 1910, pp. 134-135.
 2. *The Cambridge History of India*, Vol. I. P. 88; Barnett, L.D., *Antiquities of India*, London, 1913, p. 4.
 3. Leage, R. W., *Roman Private Law*, London, 1946, p. 97.
 4. Schrader, O., *Prehistoric Antiquities of the Aryan Peoples*, p. 389, trans. by F.B. Jevons, London, 1890.
 5. Ludwig, R. V., *Rigveda*, VI. 142.
 6. Zimmer, *Altindisches Leben*, p. 319.
 7. *Journal of Indian History*, Vol. XXVI, pt. 3, 1948, Dec. p. 249 for another view.
 8. Schrader, O., *Prehistoric Antiquities of the Aryan Peoples*, p. 387, trans. By F. B. Jevons, London, 1890.
 9. Datta, R. C., *A History of Civilisation in Ancient India*, Calcutta. 1893, Vol. I, p. 67; cf. Datta, R. C., *Early Hindu Civilisation*, Calcutta, 1908, p. 67.
 10. Majumder, R. C., *Outline of Ancient Indian History and Civilisation*, Calcutta, 1927, p. 47.
 11. *Collected Works of Sri R.G. Bhandarkar*, Poona, 1928, Vol. II, p. 459-60.
 12. Fowler, W., *Social Life at Rome*, London, 1929, p. 142.
 13. Schrader, O., *Prehistoric Antiquities of the Aryan Peoples*, p. 375. trans. by F. B. Jevons, London, 1890.
 14. Gour, H. S., *The Hindu Code*, 2nd edn, Nagpur, 1923, pp. 250-251.
 15. Mulla, Sir Dinshah, *Principles of Hindu Law*, 13th edn., Bombay, 1966, p. 159.
-

FEW HINTS FOR FUTURE ADVOCATES

S.C. Talukdar

Formerly Chief Judge, City Civil and Session Court

1. To belong to Legal profession is a matter of pride and honour. You are fortunate in having picked up this profession as your career. Legal profession is the seat of power, fame and wealth. From time immemorial it has supplied the leaders of nations—leaders who state and mould the destinies of people. It is perhaps the most lucrative profession. The income of the leaders of this profession causes awe and envy amongst others. Yet when the call for sacrifice for the freedom's battle comes, these leaders forsook their fabulous income to lead the struggle.
2. Naturally the legal profession has always attracted the best talents of the country. The profession may be crowded or rather overcrowded. There is, however, always a place at the top. Even if you fail to reach the top but reach about the middle of the ladder you are assured of a comfortable income and position in the society. What is needed for the objective is sincerity of purpose and hard work. There is no substitute for hard work to attain success in the bar.
3. A newly enrolled advocate is at sea as he enters the profession. For so long he has only learnt the abstract principles of law with no practical experience of how the law is administered, how the various petitions are drafted and moved, how the cases are submitted before the court and how best to meet the adversaries' new point etc. Instead of waiting till graduation and enrolment, it is advisable for a law student to enter an advocate's chamber from the very beginning and study his briefs. It is better to follow one particular case from the beginning till the end and in course of the same to attend the concerned court on all days. He will then see for himself how the examination-in-chief is conducted, and cross-examination is done. Arguments advanced on either side should be followed with interest and judgement delivered perused with care. It will be easy for him to follow all these procedures as he is already posted with the facts of the case. The law reports cited by the parties should also be read at the same time. If a law student follows the above procedure say in 50 cases he will have learned a lot. He will be ready and well-equipped to face the life's struggle as he enters the profession. Familiar by this time with the atmosphere of the court and its working he will confidently face his first client as he enters his chamber.

4. Examination-in-chief is a more difficult art than cross-examination. Such examination is to be done within the bounds of pleadings. Such limitations do not inhibit cross-examination.
 5. While attending advocate's chamber try to learn the art of drafting petitions which are necessarily of various kinds. Good drafting is a great asset which comes only as a result of intensive practice.
 6. An ideal lawyer is the complete lawyer who knows all branches of law and does not refuse a civil case on the plea that he is interested only in criminal cases. Now-a-days, however, the law has become so complete and diverse that it is humanly impossible to have even a working knowledge of all aspects of different laws. It may therefore be advisable to select that branch of the law which appeals to you and pursue accordingly. It should be borne in mind that civil and criminal laws are closely inter-mixed and in order to succeed as a criminal lawyer you must have a proper background of civil laws. There is one aspect of law of which you must have a thorough knowledge and this is the Evidence Act. You can always create good impressions upon the minds of the court once you master the law of evidence; and the law of evidence is of everyday use in all courts. There is no difference between the rules of evidence in civil and criminal cases. The probative effect of the evidence is not, however, the same. While civil cases may be proved by a mere preponderance of evidence, in criminal cases the prosecution must prove the charge beyond all reasonable doubts.
 7. Make it a point to attend court before the judge takes his seat. Your court-manners must be above reproach. You should be respectful to the court without any attempt for flattery. Thereby you will earn the esteem of the court, and the esteem of the court is an asset for any member of the profession.
 8. Study the brief with utmost care. Never pitch your case higher than it rightly deserves. Let the facts of the case be on your fingertips. It is able to Marshall the facts of the case so as to convince the judge. Law will take care of itself. The Judge knows how to first the law once sopitied about the truth of the facts on your side.
 9. Do not lose your heart from the income of the first few years. Better days await you. I wish you sincerely the best of luck.
-

AN ASPECT OF UNIVERSITY EDUCATION

Dr. P.N. Banerjee

M.A., LL.B., P.R.S., L.L.D., D. Litt., Barrister-at-Law

The education of a country may be, and often is, its policy, but it should never be permitted to sink into its politics. In the Preamble to the Written Constitution which governs the destinies of a sixth of the total human race, we have promised to secure to all our fellow citizens :

Justice : social, economic and political;

Liberty : of thought, expression, belief, faith and worship;

Equality : of status and of opportunity.

We have further more vowed to promote amongst all our fellow citizens, *Fraternity*, assuring to them as well as to ourselves "the dignity of the individual and the unity of the Nation."

In the Directive Principles of State Policy, our Written Constitution has given a solemn assurance to the people of India that the "State shall endeavour to provide, with a period of ten years from the commencement of the Constitution (*i.e.*, 26th of January, 1950), for free and compulsory education for all children until they complete the age of fourteen years." Three years have rolled by since the commencement of the Constitution, and yet eighty percent of the total population of the Indian Union is illiterate to-day. Education in India has not yet been able to shed its colonial character. It was the first casualty in world war no. II. Its wounds have not yet healed up. The Government of India at the Centre has not yet found it possible to spend more than one percent of its total revenue on education. Yet, we must all remember that if our freedom has to broaden down from precedent to precedent, if the democracy which we have established in India has to thrive, then we must, after satisfying all the elemental needs of the population, give education our first and primary attention. This is the scientific age of planning, and we must plan our system of education on the basis of a system of democratic living. The education of the future must not only produce superman but also must afford opportunities of development to the common man. Education, in its different stages, is a unity and must be an effective means not only of national reconstruction but must also be imbued with the democratic spirit of the age and the social ideals which India with its glorious heritage holds so dear. The education in any country of the world unfolds in us our instincts which God Almighty has planted into the human system. It implies extension of opportunities of

creativeness, of self-knowledge, of self-control and of moral independence. Education to-day stands on the cross-roads in a world fraught with fear and darkened by the lust of the power-politics. Two world wars of destruction in the course of a quarter of a century have undermined the social and ethical values of human life. A true type of education can alone raise human values and save human society from bondage. The regimentation of thought, unnecessary domination by the state polive meticulous interference by politicians in any country of the world must be avoided. In our country we should not merely cast a longing lingering look behind. We must strike a balance between the past and the present, and we have to wage superman might against the onrush of time. Impace idealism regrets divorce between our society and our system of education. It desires a fight rightly against undisciplined thought, running rampant throughout the country perhaps in a stage of transition from helotage to freedom. Does power-impulse dominate every walk of life? Do we agree with the view that the entire national life in our country has been tainted with corruption and nepotism, that we have become narrow, petty and self-engrossed, thinking more of self than of community? It is agreed perhaps on all hands that education and culture differ from knowledge and technical skill. Democracy, they say, does not function unless there is education. The last general election in India illustrated the truth of the proposition that inherited culture succeeds inspite of illiteracy. It is perhaps not realised by all that the electorate of India at the last general election had a size greater then the total population of the United States of America and was almost equal to the total population of the Soviet Republic of Russia. The elections went off peacefully and well. This was the result of the inherited culture of centuries and of our peaceful way of life. We have therefore no ground for despair about our future. We must have more education and we must have batter education. We must have self knowledge, we must have self-centrol, so that India of the future may perform her duties towards mankind in a world, surrounded by fear and sorrow, perhaps, grovelling in a welter of blood and of national salfishness. I believe, you believe, with all the fervour of our souls that India of the future will have a great mision for mankind. That mission of peace and will amongst men will be furthered only by the reorientation of our entire system of education.

What role will the Universities in India play in the future reconstruction not only of our system of education, be our national regeneration? More than a century ago, Thomas Carlyle, the great English writer, in his address to the students of the University of Edinburgh, described a University as a collection of books. Cardinal Newman characterised a University as a corporation of scholars. Libraries and museums do not constitute Universities. Corporations, after all, have no soul. A University must constitute a republic of letters. It will stand for an empire of ideas. It will lead the nation and yet it will be the first servant of the people. A University cannot live in isolation. A University must not only be a store-house of knowledge, but must be the disseminator of knowledge amongst the people of the country.

Put very roughly, there are four different types of University education in the world. One system deals with education as is necessary for the acquisition of knowledge and skill for the

purposes of an empire. The second system is absolutely dominated by the state and believes in regimentation of thought—whether that thought is an expression of the political ideas or of the religion of that state. A third system of University education is extremely conservative in character, and believes in the doctrine of traditionalism. A fourth system believes in the doctrine of mass production for affording equal opportunities to the common man and believes in the regulation of a democratic way of life. Our pattern of University education in India cannot cut itself adrift from the old moorings of a mixed and plural society of the glorious traditions of a past history, nor can it be a bridge merely between the past and the present. It stands at the confluence of the glory that was ancient India and the splendour that shall be the India of the future. Has the atomic age come? If it has come, what would be the objective of science? Will it be the destruction of the elemental human values, the fundamental basis of human freedom? 'Or will science be harnessed to philosophy and will help in the flowering forth of the divine instincts in men and women? The main purpose of University education in India, as elsewhere, must be the building up of men and women—men and women with human face divine, men and women with religious conviction and selfless devotion to the cause, not of a country alone, but of humanity in general. Education means faith, conviction, devotion.

In any scheme of reconstruction or reorientation of education, we must first of all think of the pupil and the teacher. We often dream of the past. Where is the Ekalabya of to-day who will cut off his forefingers as a gift to the *guru* of his vision. Dronacharyya, who declined to accept him as a pupil because he belonged to the ranks of the Non-Aryan? Where is Uddalaka to-day who at the behest of his *guru* lay flat in a field so that the corn of the *guru* might thrive? The youth of my country I am no poet. If I were one, I would have sung in melodies the song of the youth of my country. I am no painter. If I were one, I would have painted in the glories of colours the youth of my country before which Madona's figure would have paled. I am no sculptor. If I were one, I would have carved out of the whitest of marbles the figure of the youth of my country. My work of art would have beaten Phaedias of old. And the teacher! Does he live in obscurity and contend with hardship? "For him no trumpets blare, no chariots wait, no golden decorations come. He keeps the watch along the borders of darkness and makes the attack on the trenches of ignorance and folly. Patient in his daily duty, he awakens sleeping spirits. He quickens, the indolent, he encourages the eager, he steadies the unstable. He is king of himself and servant of mankind."

The Universities in Indian may not have been dismal failures, but that have suffered from many defects. They have suffered from a pernicious financial anaemia. They have suffered from the effects of a colonial budgetary system which insists on enthroning a police state. The proposed establishment of the Universities Grants Commission in India may perhaps solve the problem of distribution of grants-in-aid from the coffers of the State. No Universities Grants Commission in any country in the world has control over allocation of funds. The proposed Universities Grants Commission in India, instead of being attached to the Treasury, as in the case of the United Kingdom, will be an annexe to the department of education. This departure, it is apprehended, will not help the Universities to the same liberal extent as in the United

Kingdom. The proposal of the Government of India to exercise domination and control over all Universities, notwithstanding the injunctions contained in the written Constitution of India, with the professed object of equalisation of standards, is a threat to academic freedom without which no University in the world can flourish or prosper. It will be a profound error to have the same pattern for all Universities in India. India is a union, not a unity. Difference in culture, in language, in traditions, in habits of thought and behaviour, must find reflection in the constitution and the functions of the Universities in India they have to maintain a correspondence between the advancement of knowledge and the satisfaction of social needs. This does not simply that every University in India will for all times to come be a self-sufficient use and have an empire of its own. It may be quite possible to co-ordinate the activities different Universities situated in different parts in India so that one University may be deemed to be the centre of specialised study and research in a particular branch of knowledge and another University might be regarded as an emporium of other specialised branches of knowledge and research. Adoption of this co-operative attitude on behalf of the Universities in India—based on free association and not on behalf of the patronised state control from the centre—will help in consolidating the fundamental national unity of India, will solve to a large extent the problem of diversity of regional languages, and it is hoped, will break down the barriers of history and discourage provincialism. If we have to maintain our hard-earned freedom, if we must strive to be in the vanguard of the nations of the world, we have to make countless sacrifices for the attainment and the consolidation of national unity in India. The claims of religion, perhaps interested motives of colonialism, have unfortunately bifurcated the fundamental unity of India. India never was and never will be a geographical expression.

University education in India suffers from its birth-pangs even to-day. The policy of neutrality adopted by our British rulers of the past in matters of religion led to the introduction of an almost Godless system of education in our country. In every University provision should be made for the introduction of some form of ethical instruction. Our Universities also suffer from the after-effects of the chaotic conditions of the world caused by the two world wars, and the over-emphasis placed upon politics on our Indian way of life. Under the present Constitution of India every adult citizen is entitled to franchise. The exercise of franchise involves some kind of participation in politics. The exercise of utmost academic freedom by our teachers and pupils can put a ban upon political thoughts or expression. But we must realise that the main duties of the pupil and the teacher would be overlooked if over-emphasis is laid upon politics. Many of our Universities function in surrounding which are not ideal for the birth, the development of academic freedom. While the idea of being far from "madding crowds ignoble strife" is not to be recommended, as leading to the proverbial life of the frog of the well, the surroundings of the University should be such that the pupil and the master can breathe God's free air. The utmost stress in my view must be laid upon intimate contact between the teacher and the pupil : that contact is frequently missed in the busy crowded life in the cities, and is lacking in overcrowded institutions. The correspondence of the mind of the master and the pupil is the essence of University education.

University education in our country should begin after a student finishes his school career. The Intermediate examinations of Indian Universities and of Boards of Secondary Education really constitute platforms from which students branch off into different faculties. These Intermediate examinations are but a transitional stage in academic life. It is not necessary for every student who reads in a school to get into a University. Unless a student is equipped mentally, morally and spiritually, he should not, as a matter of course, enter a University. Nearly forty years ago, a great educationist, Sir Asutosh Mookerjee, while delivering the first Convocation address of the newly founded University of Mysore said, "Let mental deficiency, moral obliquity, but not poverty be a bar to the acquisition of knowledge."

One could visualise in future establishment of a self-sufficient system of high school education in India. That system of education must be of a diversified type. Most of the average students in this country who desire to earn a living through government service or through agriculture, industry, commerce or through a career in the defence forces of the Indian Union, should have efficient education of a diversified type in our schools. The ideal is rosy, the translation of the ideal into reality is indeed a baffling problem. The Mudaliar Commission appointed by the Government of India is dealing with the problem of Secondary Education in our country. We shall all await with anxious interest the publication of the report of that Commission. Our only anxiety is that commissions in this country as elsewhere are often regarded as a primordial method of shelving problems. The Sadler Commission's Report intended for the reconstruction of the University of Calcutta has, due to financial and political reasons, been long asleep on the dusty upper shelves of our secretariat buildings. The Radhakrishnan Commission's Report is yet suffering from somnolence. We shall indeed welcome its galvanisation into life.

The Secondary system of education in any country in the world is indeed the backbone of higher education. When and how our high schools will be remodelled is perhaps only known to the gods. The remodelling of Secondary Education in India means the employment of qualified teachers, the proper payment of their salaries, the equipment of libraries and laboratories, and adequate provision for accommodation. The first city in India is studded with high schools without proper air and light, without playing fields, without sufficient accommodation for boys and girls, with a tutorial staff discontented in the main on account of economic reasons—without hope of the future and depressed beyond words. The libraries of most of these schools are poor. Laboratories simply do not exist. How to upgrade these high schools so as to make them at once the termini of the careers of a vast majority of the students studying in them, and at the same time to make them gateways to Universities, is a problem which will require great skill, judgment and financial support.

Regarding the problem of curricula of studies in our Universities and in our schools, it is not possible to discuss within the space available to me to discuss it at the Universities. The curricula must be of such a type that the sons and daughters of free India may not be obliged to study abroad. No one will minimise the importance and the value of foreign travels,

but political economy and national self-respect, both demand that such sojourn in foreign countries for purposes of acquiring only ordinary degrees of foreign Universities should as far as possible be avoided. The curricula of studies of our high schools must be of a diversified type, and may be capable of bifurcation—one type intended for a selfsufficient high school course and another primarily designed for admission to our Universities. In any event, great importance should be attached to development of character, to eradication of physical infirmities and to acquisition of what may be characterised general knowledge and general culture.

While discussing the curricula of studies of our colleges and schools, a few observations might be made on the complex question of the attainment of the objectives by the curricula of studies. To-day the main objective of study in a school or college is the passing of an examination. The examination system, has taken out the joy of study and the delight of life from amongst our students. China, the great treasurehouse of knowledge and wisdom of humanity, has made some great gifts to the world. Four of those great gifts have been perverted in use. The first gift which China made to the world was the mariners compass. The discovery of that instrument by man made sea voyage comparatively safe. Pirate junks and dhows equipped with mariners compass fought the typhoon and the coasts of China herself. The second gift which China made to the world is the gun-powder. In a sense the powder was the cause of the temporary decline of Asia and the emergence of power-politics in Europe. The third gift which China made to the world is the printing press. The printing press has indeed expanded the bounds of human knowledge, but has also been instrumental in the publicising of obscenity and blasphemy. The fourth great gift which humanity received from China is the system of examination. The Chinese mandarin was obliged to pass examinations all his life, even beyond the proverbial biblical three score years and ten. Humanity seized with avidity the mandarin system of examination. Free India has welcomed the system of examination as a test of merit and competence to public services in all spheres of State activity. The system of trial by jury, after the Napoleonic wars, came to be embodied as one of the fundamental rights of the citizen in all progressive countries of Europe and America. The system of trial by jury was not without flaws; trial by jury suffers from human passions and human prejudices. The present Constitution of India has erased trial by jury from the list of fundamental rights of the citizen. Who in the future will modify, if not erase, the system of our examination? For could not our Universities and Secondary Boards of Education adopt one of the recommendations of the Radhakrishnan Commission, viz. to adopt and extend the Credit System as known to many Universities and educational centres of the world? The Credit System is a record of the day-to-day activity of the pupil. If the system is adopted he has not to suffer from the vagaries and accidents of examinations.

Last of all, a few observations may be made regarding the burning problem of the medium of instruction and examination in our Universities and our school-leaving examination? The claims of the mother-tongue, the claims of regional languages, the claims of Hindi as a national language and the claims of English as a foreign tongue have been many a time weighed and

re-weighed in the balance. For the tender child, the mother-tongue has been prescribed. In the case of High schools, the claims of regional languages have been admitted. For colleges and universities the choice has hovered round the national language and English. Many of our States in India are inhabited by plural societies. Very few States can claim to have only one language. There are cosmopolitan cities like Calcutta and Bombay, where schools are run for the benefit of such diverse school-going population as the Chinese, the Armenians and the Jews on the one hand, and the Tamils, the Telegus, the Punjabis, the Marwaris, the Oriyas, the Assamese and the Hindi-speaking pupils on the other. We are a secular State and we cannot afford to ignore the claims of Urdu-speaking children. What is the regional language in a plural society? A regional language, if there is no plural society, will perhaps in future acquire the status of a national language of that State. But at present to force a regional language like, let us say, Bengali, which has a very rich literature on the non-Bengali-speaking children in schools will not only impede their intellectual development but will destroy parity in examinations and may instantly lead to a virulent kind of linguistic provincialism. A further vivisection of India on linguistic basis alone is a danger which in the interest of national unity should be avoided. Hindi in the *devnagri* script has now been recognised as the national language of Indian Union. To make Hindi the vehicle of thought and expression for official or ordinary purposes is quite different from making Hindi compulsorily the medium of instruction and examination throughout India, particularly in the non-Hindi-speaking areas of India. Bengal's proximity to Behar, the insistence of Sanskrit as a compulsory subject of study at the school stage by the University of Calcutta for nearly a century, may perhaps make the position of Bengal easier than the case of many of the States in Southern India where the Hindi language is not cultivated and the *devnagi* script is almost unknown. According to our Constitution, English disappears from India after a period of fifteen years from its commencement. It will be difficult to impose Hindi upon all the Universities in India as the medium of instruction and examination even after the period of fifteen years. Most of the text books are written in English. They have either to be translated or text books will have to be written in the Hindi language. The result may be that all the energies of the scholars will be absorbed in the task of translation. Original thinking will then suffer. We have also to remember that for many years to come, English will be necessary for maintaining our inter-statal contact. We cannot forget the importance of English as an international language. We should therefore think over the matter very seriously, not merely from the point of view of sentiment, but from the point of view of feasibility. The story of the imposition of the Russian language on Poland or the imposition of the English language on Ireland is well known. It may be mentioned here that Canada and South Africa are both bi-lingual. The decision of Lord William Bittick to supersede Persian by English as the court language of India upon the Persian language and literature is well known. Could it be argued that the educational backwardness of Muslims in India for many years, who were after all the rulers for India long centuries, was due largely to the imposition of English upon them? Could we therefore go slow? Here raw haste will be 'half-sister to delay'.

The present system of education producing unemployment does not brighten me. It has

appeared in a press note that sixteen thousand graduates in India are sitting idle. Why should they sit idle at all? Surely we have sixteen thousand primary and secondary schools throughout the length and breadth of India, and surely these graduates could be absorbed as teachers in these schools. A University should not be regarded as a service-securing agency. The confusion of the boundaries governing the functions of the State and of the Universities might with porfit to the nation be avoided. Besides, can not each graduate make a vow that he or she should be able to educate at least one pupil to his or her satisfaction?

“Let knowledge grow from more to more;
But more of reverence in us dwell;
That mind and soul, according well,
May make one music as before;
But vaster.”

"THE CONCEPT AND JUSTIFICATION FOR IMPOSING CONSTRUCTIVE LIABILITY UNDER INDIAN PENAL CODE"

By : S. S. Chatterjee, LL.M., Research Scholar in B.H.U., Varanasi

Offences under the Indian Penal Code or under any other penal statute are not always committed by individuals acting on their own. In fact, a considerable number of offences are the outcome of joint efforts and it is obvious, therefore, that if individuals in a group were to be held liable on the basis of the specific role they had played in a drama constituting an offence, the prosecution has to face the herculean task of proving in all such cases that a particular individual had committed a specific act constituting an offence with the *mens rea* requisite for such offence. Indeed, this should have led us to an anomalous situation for it is our common knowledge that whenever a number of people are involved in the commission of an offence and are apprehended, each one of them has a tendency of shifting the responsibility for the offence upon one or more of the other participants or members of the group and that the presence of impartial witnesses on the scene of offence, observing acutely such details of an incident as might be required to prove the guilt of individuals, is a rare occurrence. The inevitable alternative in such cases is either to hold each and every member of a group liable for the offence or offences committed or to give the benefit of doubt to all of them. The law of this country has chosen the former and this happened to be the approach in England from where we have borrowed our existing formulations of law on this aspect.

The liability for the act of any one of a group on every member of the same group is imposed by judicial construction or interpretation. A liability, so to say, is construed or presumed by law which might not exist in reality and hence a liability of this nature could be named as 'constructive liability', 'joint liability' or 'group liability'¹. 'Constructive liability' is not wholly a new concept. It had existed in some form or the other by way of 'collective responsibility' in primitive societies and was based on the logic that since an individual was merged in his group, his fellow members ought to be collectively responsible for his misdeeds.²

The conception of blood vengeance and vendetta, it is said, also rested on the collective responsibility of the family and even after the disappearance of blood vengeance, the concept of collective responsibility survived in the form of pecuniary co-responsibility of the group.³ In such cases the community as a whole was deemed to be guilty and answerable for the crime of any member. For instance, a village or a city could be made answerable for a murder or a theft in its midst, particularly when the said village or city failed to surrender those members of their group who had committed the crime. This appears to have been the situation even in England till the end of the thirteenth century when there was no machinery for arresting criminals or for preventing the commission of crime. (See C.S. Kenny, *Outlines of Criminal Law*, 9th ed., 109.). Although collective responsibility is still resorted to in certain developing countries⁴, legal principles have since undergone considerable changes and it is generally felt today that criminal guilt is personal and that mass-punishment should be avoided. Collective responsibility as a concept was a form of constructive liability of the modern times. Nevertheless, the modern concept of 'constructive liability' is clearly distinguishable from 'collective responsibility' of the older times.

B. The Basis and Justification for Constructive Liability.

Constructive liability under the Indian Penal Code is founded either upon the common intention of a group of persons to commit an offence and participation in the commission of it or upon common object which impels the persons, in an unlawful assembly to commit some offence and either it is in prosecution of that object that an offence is committed or the offence that was committed was one that the members of an unlawful assembly knew to be likely to be committed. In the former there is little difficulty in locating *mens rea* and *actus reus* while in the latter category *mens rea* of some kind as also *actus reus*, in so far as the group is concerned, are present in order to constitute an offence. An individual constituting that group is held liable since his specific role in the commission of an offence is rather difficult to ascertain. Further, even if a particular person did not actually do what in fact had been done, this is only a matter of chance since if someone else in the group had not done it, it could as well be he himself who should have to do it.

The justifications for imposing 'constructive liability' can be enumerated as follows:

(i) When a group of persons combine to commit an offence, the presence of many in that group acts as a catalyst and encouragement to all others. In fact it may be true to say that but for the strength arising from the common will and concerted action of a group many offences would not have been committed. In other words, the heightened morale of the people forming a group is very often the only cause of a heinous crime. It is justifiable, therefore, on this ground alone to hold everyone of a group equally liable for an offence that is committed.

(ii) The other justification for imposing constructive liability upon individuals forming a group while committing an offence is that after all the persons participating in an offence cannot be regarded as blameless by any stretch of imagination. In those cases where two or more people have formed a common intention to commit an offence and have succeeded in realising their intention, does it make any difference that a single blow dealt with by anyone of them was sufficient in itself to achieve the objective and therefore there was no need for the other or others to do an overt act? At any rate there was a common intention and a joint effort for the commission of an offence.

Very similar is the situation when an offence is committed by an unlawful assembly in the prosecution of a common object or when an offence is committed and the likelihood of its commission was within the knowledge of the members of such unlawful assembly. The justification for imposing constructive liability on individual member is that he had continued to be a member of such assembly even with the knowledge of its unlawfulness and then again they continued to be so when preparations were made by the group and its conduct indicated the likelihood of the commission of such offence. Here also the blameworthy state of mind exists in each member of the group though this might fall short of the requisite intention required by law for a conviction for the specific offence that might have been committed.

(iii) The third justification arises from the fact that in all case where a number of people join to commit an offence, it is very often extremely difficult to prove the precise acts done by individual members. This difficulty, however, cannot be a justification for exempting the individual members from liability for an offence which could not have been committed but for their presence and encouragement⁵. Practically, we shall be asking the prosecution to do something impossible if we were to ask it to prove beyond reasonable doubt the precise and specific role played by each and every member of an unlawful assembly. It is, therefore, justifiable not to ask the prosecution to do so and to hold every member of an unlawful assembly guilty for the offence perpetrated by anyone or more of them, provided that the prosecution convinces the court about the identity of persons who formed an unlawful assembly and that an offence was actually committed by them either in the prosecution of the common object or that whatever happened was something that was likely to happen and the knowledge of this likelihood was present amongst the members.

1. The Webster Dictionary, 1971, at page 179 says that 'constructive' means something which is declared to be such by judicial construction or interpretation. Black's Law Dictionary, 4th ed. page 386, defines the term 'constructive' as 'that which is established by the mind of the law in its act of construing facts, conduct, circumstances or instruments; that which has not the character assigned to it in its own essential nature, but acquires such character in consequence of the way in which it is regarded by a rule or policy of law; hence inferred, implied, made out by legal interpretation...'.⁶

2. See Robert H. Lowie, *Primitive Society*, 2nd ed., 1929, 385, cited by H. Mannheim, *Group Problems in Crime and Punishment*, 1955, 45.

3. Paul Franconnet, *La Responsable*, 2nd ed. 1928, 69 cited by H. Mannheim, *Group Problems in Crime and Punishment*, 1955, 45.

4. In India, S. 10-A of the Protection of Civil Rights Act, 1955 empowers the State Governments to impose collective fine on the inhabitants of a locality if it is satisfied that they have been concerned in, or they have been abetting the commission of any offence punishable under the Act or they have been harbouring or protecting the offenders etc.

In Nigeria, a Capital Punishment Ordinance provided that in certain cases punishment may be imposed on an entire group for an offence committed by one or more of its members. See C.K. Meek, *Law and Authority in a Nigerian Tribe* (1937), 338-339, cited by H. Mannheim, *Group Problems in Crime and Punishment*, 1955, 48.

Mennheim also points out that Malaya, Kenya and Johore also have similar provisions in their statutes (pp 47-50).

5. In *Nga Tha Hitin v. Emperor*, AIR 1935 Rang 304 : 36 Cri LJ 1393, it was observed that Sec. 34 of the Indian Penal Code was justified to meet a case in which it may be difficult to distinguish between the acts of the individual members of a party, or to prove precisely the part taken by each individual. The reason is obvious, because presence of accomplices affords encouragement, protection and support to persons actually engaged in committing the crime.